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Conquest and Slavery as Foundational to Property Law

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CONQUEST AND SLAVERY AS FOUNDATIONAL TO PROPERTY LAW

*K-Sue Park**

This article demonstrates that the histories of conquest and slavement are foundational to U.S. property law. Over centuries, laws and legal institutions facilitated the production of the two commodities, or forms of property, upon which the colonial economy and the United States came to depend above all others: enclosures of Native nations' land and enslaved people. By describing the role of property law in creating markets for lands and people, this article addresses the gap between the marginal place of these histories in the contemporary property law canon and the growing scholarly and popular recognition that conquest and enslavement were primary modes of property formation in American history.

First, this article describes how the field of property law has come to omit these histories from its common understanding of what is basic to its subject by examining property law casebooks published over 130 years. For most of their history, it shows, such casebooks affirmed the racial logic of conquest and slavery and contributed to these histories' suppression in pedagogical materials. Early treatises avowed the foundational nature of conquest, but after the first property law casebook appeared, at the time of the close of the frontier, casebooks for more than half a century emphasized English inheritance, rather than acknowledging colonization's formative impact on the property system. In the same period, the era of Jim Crow, casebooks continued to include many cases involving the illegal, obsolete form of property in enslaved people; when they ceased to do so, they replaced them with cases on racially restrictive covenants upholding segregation. After several decades, during which the histories of

* Associate Professor of Law, Georgetown University Law Center. I am grateful to Bethany Berger, Guy Charles, Anne Fleming, Sheila Foster, Emily Prifogle, and Joe Singer, as well as to the Georgetown Law faculty, the University of Michigan Law workshop on Race and Property in Historical Perspective, the Advanced Critical Race Studies seminar at Boston University Law, and the Yale Legal History Forum for helpful comments and suggestions. My heartfelt thanks to Thanh Nguyen, Tammy Tran, Rikisha Collins, Taylor Ridley, and Victoire Saperstein for their incredible work on the property law casebook data. I am indebted to Ashley Burke for excellent editorial assistance. This article is dedicated to the memory of my colleague and friend Anne Fleming, and her steadfast commitment to telling the story of the people who were there. © 2021, K-Sue Park.

conquest and slavery were wholly erased, casebooks in the 1970s began to examine these histories through a critical lens for the first time. However, the project of understanding their consequences for the property system has remained only partial and highly inconsistent.

The central part of this article focuses on the acquisition of property, which, properly understood, comprises the histories of conquest, slavery, expropriation, and property creation in America. It examines the three main theories of acquisition—discovery, labor and possession-- beginning with the United States' adoption of the Discovery Doctrine, the international law of conquest, as the legal basis of its sovereignty and property laws. In this context, it shows that the operative principle of the doctrine was not that of first-in-time, as commonly taught, but the agreement of European nations on a global racial hierarchy. Second, it turns to the labor theory, which was selectively applied according to the hierarchy of discovery, and firmly linked ideologies about non-whites and property value. It then reframes the labor theory's central question—property creation—as a matter of legal and institutional innovation, rather than merely agricultural labor. It examines the correlation between historical production of property value in the colonies to show how the main elements of the Angloamerican land system developed through the dispossession of nonwhites-- the rectangular survey, the comprehensive title registry, headrights and the homesteading principle, laws that racialized the condition of enslavement to create property in human beings, and easy mortgage foreclosure, which facilitated the trade of human beings and land as chattel to increase colonists' wealth. Third, it assesses how the state organized the tremendous force required to subvert others' possession of their lands and selves, using the examples of the strategy of conquest by settlement and the freedom quests that gave rise to the fugitive slave controversy. Its analysis highlights the state's delegation of violence and dispossession to private actors invested in the racial hierarchy of property through the use of incentives structured by law.

This article concludes by summarizing how the laws that governed conquest and slavery established property laws, practices, and institutions that laid the groundwork for transformations to interests in land after the abolition of slavery, which I will address in a future companion article. This article aims throughout to offer a framework for integrating the study of English doctrines regulating relations between neighbors-- the traditional focus of a property law course—into an exploration of the unique fruits of the colonial experiment -- the singular American land system that underpins its real estate market and its structural reliance on racial violence to produce value.

CONTENTS

I. HISTORICAL ERASURE IN PROPERTY LAW CASEBOOKS	6
A. The Erasure of Conquest	7
B. The Erasure of Slavery	13

II. “ACQUISITION,” OR EXPROPRIATION & THE PRODUCTION OF PROPERTY	22
A. <i>The Racial Hierarchy at the Heart of the Discovery Doctrine</i>	23
B. <i>The Labor of Producing Property in Theory and Practice</i>	30
1. Locke’s Theory of Property Creation	31
2. The Use of Law to Produce Property in the Colonies	37
C. <i>Possession by Dispossession</i>	48
1. The Headright or Homesteading Principle: Conquest by Settlement	49
2. Property Against the Self-Possession of Human-Beings	54
CONCLUSION	61

For nearly two and a half centuries, conquest and enslavement were primary modes of creating property in America. Beginning in the early seventeenth century, English colonists up and down the eastern seaboard grew their market in enslaved people to support their growing occupation of Native Nations’ lands. By the eve of the Revolution, property in land enclosures and human beings comprised approximately 75% of all of American colonists’ wealth.¹ After its establishment, the United States continued to accumulate property in lands and people as it extended its jurisdiction to its current borders and the Pacific. Without understanding how this history of property production shaped the structure, dynamics, and regulation of the property law and institutions that underpin the U.S. real estate market, it is impossible to explain two of its most familiar and notable aspects today: its racial disparities and capacity for proliferating monetary interests from land.²

Yet despite the impact that the processes of conquest and enslavement had on the development of property practices and law in America, little to none of these histories now constitutes a regular part of the property law canon. This article addresses this conundrum and offers a framework for closing that gap. First, using casebooks as a proxy for what property law scholars have understood to be the essential elements and frameworks of the subject, it describes the patterns of erasure of these histories from the field. It then shows how these histories nevertheless underpin the architecture of the curriculum today, in keeping with the ways that early scholars affirmed conquest and slavery as the basis of the subject. When we explicitly examine these histories, I argue, they illuminate how the system evolved to produce its profits and crises in the present, in ways that we can ill-afford to ignore.

¹ ALICE HANSON JONES, *WEALTH OF A NATION TO BE: AMERICAN COLONIES ON THE EVE OF THE REVOLUTION* 95-98 (1980).

² Approximately \$51 trillion in base assets and \$15 trillion in investment assets.

Indeed, the histories of conquest and slavery help clarify the relationship between discrete topics in the property law course and the unique systemic aspects of U.S. property law that anchor its real estate market today. For generations of students in first-year property law classes, the absence of such a frame has meant that the course has had the tendency to feel like a grab-bag of topics. Before I taught Property Law for the first time, several people told me that designing the course was like assembling a train: you choose topics like cars that you string together as you please. But casebook authors reincorporated materials touching on the histories of conquest and slavery to their materials relatively recently, as I show below; many who teach the subject are not trained in these histories, and it is not surprising that these topics frequently appear to be optional cars of second-order importance -- less essential than, for example, units on estates, servitudes, adverse possession, or nuisance. It remains common to omit these topics, or if any of them appear, they do so as a add-ons-- at best, another car in the property law train. However, when well-meaning instructors present such topics as aberrations, or primarily to castigate a regrettable chapter of the past, they reinforce the idea that racial violence in property is the result of individual prejudice infecting an essentially neutral system.

This article argues that the histories of conquest and slavery present more than an opportunity for apology or condemnation, or addenda to the traditional doctrines. Rather, they comprise the train's track, and are essential to explaining what American property is and how it has been constructed by law. In order to better understand how we have arrived at our present conception of property, Part I examines property law casebooks from the late nineteenth century to the present. For over 130 years, the casebook has served as an engine of knowledge production, as well as for the explicit propagation of ideas about what we know about property from one generation to the next. The casebook, most simply, represents an ongoing effort by preeminent scholars to summate the foundational elements of a field— to identify its most important frameworks, representative doctrines, illustrative cases, and what constitutes essential background for understanding its development. This evolving set of choices indexes the ways that we have constructed, framed, and justified law, as well as how a changing society affects this intellectual development.

The study of American property law casebooks below shows that conquest and slavery were once affirmed as central to the field, but that casebook authors erased them over time, and have yet to uniformly take serious stock of their implications for the field. At a time coincident with the formal close of the frontier, the first property law casebooks set aside a robust treatise tradition of celebrating conquest, to create a lasting trend of focusing, instead, on the English feudal land system. By contrast, early casebooks offered illustrative cases involving the obsolete and illegal form of property in enslaved people, as well as other cases affirming the legality of segregation, until nearly the end of the period of Jim Crow. By the mid-1940s, however, the history of slavery had been wholly suppressed, with the history of conquest. It was not until the 1970s that

casebooks attempted to reintroduce material about either. Now, casebooks ubiquitously, if marginally, address the foundation of U.S. sovereignty in conquest, but never uniformly embraced a confrontation with the history of slavery; treatment of both subjects remains relatively rare and inconsistent.

As a result of these erasures and path-dependent development, the American property law curriculum focuses almost exclusively on English doctrines regulating relations between neighbors, rather than the unique fruits of the colonial experiment -- the American land system that underpins the real estate market and its structural reliance on racial violence to produce value. Part II offers an account of the genesis of the field through the histories of conquest³ and slavery and a sketch of what we lose from the framework of property law as it has evolved. It revisits the three main theories of acquisition in property—discovery, labor, and possession-- beginning, in Part IIA, with the Discovery Doctrine and the United States' inheritance of European extractive missions to claim the bodies, lands, and resources of non-Christian non-Europeans. I show that in Marshall's affirmation of the law of conquest as the basis for U.S. sovereignty and property—and thus jurisdiction-- the principle of first-in-time was subsidiary to the principle of hierarchy, which placed European claims above others. Part IIB examines Locke's labor theory to consider the ideology it drew from and helped propagate, which selectively applied the theory according to the hierarchy of discovery, as well as the process of property creation in colonial America. Properly understood, I argue, the story of property creation is the story of the creation of property institutions and law: English colonists labored to expropriate lands and render them property in ways structured by law, giving rise to what may be the American property system's most distinctive features—chains of title rooted in Native title, the rectangular survey, the comprehensive title registry, and easy mortgage foreclosure. They also cultivated a labor force by creating another major form of property in people, with laws that made the condition of enslavement racial, hereditary, and perpetual. Part IIC addresses the way the state organized the tremendous force required to subvert others' possession of their lands and bodies in the context of colonization and enslavement. It examines two examples-- the expropriation of lands by settlement and the fugitive slave controversy-- to highlight how the state harnessed the energy of private interests to enact the violence necessary to maintain its property system and the racial order upon which it was built.

In sum, the omission of the histories of conquest and slavery from our study of property obstructs our ability to recognize many crucial aspects of the field's systemic aspects—its role in establishing jurisdictions at every level, the mechanisms that make property interests in land liquid, the correlation between prop-

³ This article's analysis focuses on the colonial period and extends into the early Republic, but conquest continued throughout the nineteenth century and remains ongoing. *See also* Joseph Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L. J. 763, 768 (2011).

erty value and racial presence, and its reliance on private interests to meet public goals.⁴ Yet these aspects of property law are likely the most intuitive points of entry to the subject in a world of rapidly changing urban environments, rising rents, racial segregation, and homelessness across the country. Public understanding that conquest and slavery are central to the history of property in America is growing, too, making the legal academic conception of property law increasingly anomalous. Moreover, these histories have grown one of the largest markets in the world: U.S. real estate is worth approximately \$51 trillion today,⁵ the American land system on which it is based now underpins the global speculative real state market as well.⁶ As it continues to produce inequity with wealth, around the world as well as within the nation's borders, it is more urgent than ever to understand the dynamics and costs of this system's reliance on racial violence and dispossession to produce value. This article recounts how that reliance developed historically as well as how it fell outside the framework of property law, even as it continues to work across the landscape in plain sight.

I. HISTORICAL ERASURE IN PROPERTY LAW CASEBOOKS

To teach about the histories of conquest and slavery in the first-year property law course requires addressing the void left by a history of erasure. The pattern of how these histories appeared and did not in property law casebooks, beginning with the first, published by Harvard Law Professor John Chipman Gray in 1888, correlate to changing waves of national historical consciousness over the last 130 years. Early casebooks appeared at a moment of great ideological ferment, in the context of the formal close of the frontier and the ascendancy of Jim Crow. Elite legal scholars' efforts to summarize the outlines, history, and key principles of property law capture the trajectory of shifting imaginations of the field, as well as of the nation and its past. In general, casebooks have followed the current of ideologies that furthered histories of racial violence, more than they have contributed to helping us understand their role in shaping property law in the United States.

As I show below, for nearly a century, casebooks suppressed the law of conquest, though it remained "good law" on the books, while for nearly half a

⁴ As Singer warns, "We need to rewrite our history books so that our children understand the actual process by which we acquired title to lands in the United States." *Id.* at 773.

⁵ Interests in land today constitute about 60% of global mainstream assets. *Financial Accounts Guide: Derivation of U.S. Net Wealth*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM <https://www.federalreserve.gov/apps/fof/displaytable.aspx?t=b.1>.

⁶ A wide literature on global land titling programs, influenced strongly by Hernando De Soto, argues that an American style property system is key to building national wealth. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

century, they liberally incorporated cases involving the illegal, obsolete form of property in enslaved people. As this section shows, in a departure from legal treatise traditions, early property law casebooks eschewed the history of colonization in America to focus on English feudal law as the basis for property law instead. As a result, their primary focus today remains English doctrines regulating relations between neighbors. Meanwhile, when casebooks finally dispensed with slavery cases in the 1940s, they replaced them with another genre of cases affirming racial segregation—those upholding racially restrictive covenants. After the Supreme Court struck down such covenants, casebooks had little choice but to confront this law. Casebooks did not really begin to confront the histories of conquest and slavery until the 1970s, after the movements of the 1960s. Consequently, the history of conquest now appears marginally but consistently in the standard materials for the property law course. By contrast, a few casebooks address the history of slavery, but most do not, and it remains highly variable whether these topics are taught at all and to what purpose.

It is important to note that there are many possible measures by which one might characterize the scope of casebooks' erasure, including what a wider literature and set of perspectives would contribute to our understanding of the histories of conquest and slavery in relation to American property law. For the present purpose, my analysis is confined to the narrow and simple metric of what content the canon once held and what it now contains. That is, I focus on the path leading to casebooks' incorporation of the materials that typically provide fodder for classroom discussion of these histories at the present time, namely: 1) the monumental 1823 John Marshall decision in *Johnson v. M'Intosh*, which affirmed conquest as the root of U.S. sovereign and private title; and 2) the presence of an independent section, however brief, about the American slave trade, and the infamous Roger Taney opinion *Dred Scott v. Sandford*, which rejected the idea that descendants of enslaved Africans could be rights-bearing citizens of the United States.

A. *The Erasure of Conquest*

Nearly every property law casebook in circulation today recognizes the fundamental status of the 1823 John Marshall decision *Johnson v. M'Intosh* to the subject. The case, which remains current law and clearly identifies conquest as the root of title to land in the United States, also appeared frequently in nineteenth century treatises. As Stuart Banner writes, it "quickly assumed a prominent place in them, as the authoritative statement of the foundations of American property law" and "became part of the canon of celebrated cases that all learned lawyers knew."⁷ In his overview of U.S. jurisprudence, James Kent

⁷ STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 188 (2009).

drew on *Johnson* to explain how Congress came to have “a large and magnificent portion of territory under their absolute control and disposal”: “[t]he title of the European nations, and which passed to the United States, to this immense territorial empire, was founded on discovery and conquest.”⁸ Joseph Story also opened his venerated 1833 *Commentaries on the Constitution*, which he dedicated to Marshall, with a summary of *Johnson*’s explanation of conquest as the origin of sovereign title and territory in the United States.⁹ As Kent elaborated, the case was essential for understanding “the history and grounds of the claims of the European governments, and of the United States, to the lands on this continent, and to dominion over the Indian tribes.”¹⁰

Nonetheless, *Johnson v. M’Intosh* did not appear in Gray’s seminal casebook, nor in property law casebooks thereafter until 1960. Instead, Gray framed American property law primarily in terms of its descent from the English feudal system,¹¹ rebuffing a great American preoccupation with the history of conquest and the disposition of the public lands. His introduction to the law of real property focuses on aspects of the English system that perhaps distinguish it most from its American offshoot: it devotes twenty-eight pages, for example, to topics such as the manor, military tenure, socage tenure, and tenancy in frankalmoign, which are at best marginally relevant to the American system.¹² Gray’s historical account of the property system’s evolution through public land law in England devotes a mere two paragraphs to “Tenure in the United States,” which consist of a dubious claim that colonies were held as English manors, and a long excerpt from an 1859 N.Y. appellate decision stating American colonial property law was more feudal than England’s own.¹³

This focus on English law sharply contrasts with other well-established understandings of property and American legal development at that time. Story,

⁸ JAMES KENT, COMMENTARIES ON AMERICAN LAW 257 (1832).

⁹ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 2–8 at 4–7 (Cambridge, Little and Brown 1851).

¹⁰ *Kent*, *supra* note 8. See also K-Sue Park, *This Land is Not Our Land*, 87 U. CHI. L. REV. 1977, 1996 (also citing 1 JOSEPH KINNICUT ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND IN THE SOIL AND SHORES THEREOF 41 (Harrison Gray 1826); 10 TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 33, 147 (Little, Brown 1895); JOSEPH KINNICUT ANGELL AND JOHN WILDER MAY, A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND SUITS IN EQUITY AND ADMIRALTY 416–17 (Little, Brown 1869).

¹¹ 1 JOHN CHIPMAN GRAY, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY (Cambridge, University Press 1888).

¹² *Id.* at 385–407.

¹³ *Van Renssalaer v. Hays* 19 N.Y. 68 (1859) (concerning rent in arrears). The case is representative insofar as it was a common nineteenth-century practice to cite to English authorities.

for example, explained his choice to begin his *Commentaries* with *Johnson's* summary of the history of conquest by the fact that it would be “impossible to fully understand [the Constitution’s] nature and objects” if we neglected “a careful review of the origin... and juridical history of all the colonies.”¹⁴ In contrast to Gray’s suggestion that American property law was a mere transplant from England, Story emphasized that “[t]races of these [colonial] peculiarities are every where discernable in the actual jurisprudence of each State.”¹⁵ Where Gray’s introduction to real property comprises a description of the English system, wherein “all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is styled, the lord paramount, or above all,”¹⁶ Story acknowledged an American relationship to property unimaginable in England when he wrote that “there has never been in this country a dependent peasantry. The yeomanry are absolute owners of the soil.”¹⁷ An 1864 property law treatise by Emory Washburn, too, suggested that feudal tenure was never transferred to nor claimed by the states. He cited an American Jurist writer who bluntly stated, of the Northwestern Territory, “the doctrines of tenure do not here exist even in theory”¹⁸; and Washburn further explained that “[i]t is undoubtedly true... that many of the principles of our law of real estate... were borrowed originally from the feudal system... But it is apprehended that the adoption of forms of process borrowed from a once existing system of laws, does not necessarily imply that that system has not become obsolete.”¹⁹

Neither prior authority nor the historical record, as I show in Part II of this article, explain Gray’s insistence on English inheritance so well as ascendant ideological tendencies of the time. In 1890, the U.S. Census Bureau declared the frontier formally closed-- on the basis that there was no longer land within U.S. territorial boundaries occupied by fewer than two white people per square mile. Many American intellectuals were eager to move past the colonial experience to place the U.S. on an equal footing with European nations. Gray’s casebook epitomizes an impulse to align U.S. legal and political systems with European traditions that his contemporary Frederick Jackson Turner famously critiqued in his landmark essay, “The Significance of the Frontier in American History.” Against the trend of emphasizing European derivation, Turner wrote

¹⁴ *Story, supra* note 9.

¹⁵ *Id.* at 1 (“our domestic institutions and policy... have grown out of transactions of a much earlier date, connected on one side with the common dependence of all the Colonies upon the British empire, and on the other with the particular charters of government and internal legislation which belonged to each Colony.”).

¹⁶ *Id.* at 385.

¹⁷ *Id.* at 160.

¹⁸ 2 EMORY WASHBURN, A TREATISE ON THE LAW OF REAL PROPERTY 42-43 (Boston, Little and Brown 1864).

¹⁹ *Id.* at 43-44.

that “the peculiarity of American institutions is, the fact that they have been compelled to adapt themselves to the changes of an expanding people—to the changes involved in... winning a wilderness...”²⁰ The American frontier, he argued, was utterly distinct from European borders because it was characterized by movement, the promise of “free land,”²¹ and constituted “the meeting point between savagery and civilization.”²² He identified this failure to attend to westward expansion as a loss for scholarly, institutional understanding; writers who wrote about the frontier had mythologized the “border warfare and the chase,” he bemoaned, but not seriously studied the significance of territorial expansion for America’s economy and history.²³

This failure has been a loss for the study of law as well.²⁴ For generations after Gray, casebooks largely ignored the impact of over 260 years of endogenous legal development in the colonies and the early Republic, encompassing the creation of the survey system, title registry system, easy foreclosure of lands, and more.²⁵ To the extent that they offered an account of the system’s historical evolution, they focused on English feudal law, producing incongruous and sometimes mystifying texts as casebooks began, no doubt for practical reasons, to incorporate more American cases.²⁶ It remained common to recite Gray’s suggestion that colonists had merely imported English property law to

²⁰ FREDERICK JACKSON TURNER, *THE SIGNIFICANCE OF THE FRONTIER IN AMERICAN HISTORY* 2 (1921).

²¹ Many scholars have discussed the euphemistic metaphor of “virgin land” for genocide. See HENRY NASH SMITH, *VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH* (1970). For an account of the removal aspect, see K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878 (2019). Turner also erases, if not the history of westward expansion, race from the Census Bureau definition: writes that “In the census reports [the frontier] is treated as the margin of that settlement which has a density of two or more to the square mile.” *Turner, supra* note 20, at 3.

²² *Turner, supra* note 20, at 3.

²³ *Id.*

²⁴ See *infra* Part II.

²⁵ See below, Part IIB. Gray’s first two books address the ancient English distinction between real and personal property, citing the thirteenth-century jurist Henry de Bracton and cases almost exclusively from 17th-19th century *English* courts—King’s Bench, Exchequer, Common Bench, Queen’s Bench, Chancery-- and one case from the Supreme Court of Pennsylvania. The first case in the volume, *Aubin v. Daly*, however, concerns annuities granted for surrender of colonial interests in Barbados and the Leeward Islands to the Crown. *Gray, supra* note 11, at 2.

²⁶ With exceptions—see generally RALPH WILLIAM AIGLER, *CASES AND MATERIALS ON THE LAW OF REAL PROPERTY, ACQUIRED ORIGINALLY AND BY TRANSFER INTER VIVOS* (all eds., 1916, 1932, 1942); RALPH WILLIAM AIGLER ET AL., *CASES AND MATERIALS ON THE LAW OF PROPERTY* (all eds., 1951, 1960).

America²⁷; where the term “conquest” appeared, it referred to William of Normandy’s eleventh century conquest,²⁸ not English settlers’ occupation of America. Nonetheless, cases in these books also referred to specifically American phenomena, such as “lots” and “blocks” of tracts and the iconic 160 acre quarter section of the U.S. survey system, and even annuities granted for surrender of colonial interests in Barbados and the Leeward Islands to the Crown, which went without explanation. In the 1930s, for example, University of Michigan Professor Ralph Aigler noted in passing that “[t]he practice of recording or registering instruments of title, while general in the states of the United States, is followed only in portions of England,” without explanation of the reason or significance of this difference; he then discussed at length a statute of *Anne* applicable only in the county of Middlesex, England.²⁹

In short, *Johnson* and the history of conquest were largely shut out of property law casebooks for decades.³⁰ One exception during this period illustrates that property treatises did not follow casebooks in this respect: Homer Dibell’s 1920 casebook drew on property law treatises, including Washburn’s and another by Alfred Gandy Reeves, which described U.S. title as rooted in conquest, cited Story, and reviewed the history of the federal survey and disposition of the public lands.³¹ Dibell, a Minnesota state Supreme Court Justice, diligently

²⁷ See, e.g., ARTHUR MARTIN, CASES AND OTHER MATERIALS ON THE LAW OF CONVEYANCES 17 (1939), (“It is generally assumed that the colonists brought with them as much of the common law and statute law of England as was suitable to their new circumstances in this country”; “The extent to which these English forms and theories of conveyance have been a part of our law is a matter on which there is some diversity of opinion.”).

²⁸ WILLIAM WALSH, SELECT CASES ON THE LAW OF REAL PROPERTY 203-07 (1906); WILLIAM WALSH, SELECT CASES ON THE LAW OF PROPERTY REAL AND PERSONAL 243-246 (1922); *Martin*, *supra* note 27, at 1-5; WILLIAM WALSH AND RUSSELL DENISON NILES, CASES ON THE LAW OF PROPERTY 52-58 (1939); HARRY BIGELOW AND SHELDON TEFFT, CASES AND OTHER MATERIALS ON THE LAW OF PROPERTY 497-99 (1941); RALPH AIGLER, CASES AND MATERIALS ON THE LAW OF TITLES TO REAL PROPERTIES 225-27 (1942); HARRY BIGELOW, CASES AND MATERIALS ON RIGHTS IN LAND 1-19 (1945); JOHN BLAKE, CASES ON THE LAW OF REAL PROPERTY 1-6 (1948); HOWARD WILLIAMS, CASES AND MATERIALS ON THE LAW OF PROPERTY 56-91 (1954); ALFRED GANDY REEVES, A TREATISE ON SPECIAL SUBJECTS OF THE LAW OF REAL PROPERTY (1904).

²⁹ RALPH WILLIAM AIGLER, CASES ON THE LAW OF TITLES TO REAL PROPERTY, ACQUIRED ORIGINALLY AND TRANSFERRED INTER VIVOS 844-46 (1932). The section on Title Registration, for example, an indisputably American innovation, is a rare section not presented through history, but rather, practical instructions for navigating the system. Where he mentions the Torrens system, Aigler admits it was developed to colonize Australia, but strains to argue that many European countries were doing the same. *Id.* at 979-83.

³⁰ One casebook excerpted a case, *Barnett v Barnett*, 117 Md 265, 83 A. 160 (1912), that briefly cited *Johnson* for the proposition that title was absolute. WILLIAM L. BURDICK, ILLUSTRATIVE CASES OF THE LAW OF REAL PROPERTY 37 (1914).

³¹ ALFRED GANDY REEVES, TREATISE ON THE LAW OF REAL PROPERTY 1405-14 (1914).

described the history of Minnesota lands, some of which Great Britain ceded in the Treaty of Paris and some of which the United States acquired through the Louisiana Purchase. He acknowledged that “portions of the lands ceded were occupied by Indian tribes after the Indian fashion,” briefly described the federal structure of Indian law, and summarized the issue of Indian Occupancy, commenting that “in theory at least the government respect their rights of occupancy.”³² It was not until 1960 that University of Illinois College of Law Dean John E. Cribbet followed Dibell’s example by opening his casebook with a straightforward recitation of the root of U.S. title in government grants, “the earliest of [which] were made by European governments seeking to colonize the New World.”³³ In a footnote to this history, Cribbet and his co-author Corwin Johnson made the first substantive reference to *Johnson* to appear in a casebook, in a description of recent Supreme Court cases that relied on *Johnson* as good authority to detrimental effect.³⁴

In 1974, in the wake of massive social movements across the country, Charles Donahue incorporated *Johnson*, along with the sit-in cases, into the text of an American property law casebook for the very first time.³⁵ In 1978, Richard Chused followed and placed *Johnson* in a lengthy, groundbreaking section on conquest and federal Indian law.³⁶ After Joseph Singer published a casebook including *Johnson* in the early 1990s that remains the standard for teaching about conquest and race in property law,³⁷ the trend was set. *Johnson v. M’Intosh* now appears in every property law casebook, although teaching notes differ widely in terms of providing information about the case’s content and historical significance. Despite the inclusion of *Johnson*, as Singer, has written, “Amazingly, some property casebooks fail to mention Indians at all. Most property casebooks treat conquest as unfortunate but past,” or arrange material “as if to show that we have moved beyond barbarism to civilization.”³⁸ Professors Thomas Merrill and Henry Smith, John Sprankling, and Jerry Anderson and Daniel Bogart all omit a basic historical description of the role the Discovery

³² HOMER BLISS DIBELL, CASES ON REAL PROPERTY 3-4 (1920).

³³ JOHN E. CRIBBET, WILLIAM F. FRITZ, AND CORWIN W. JOHNSON, CASES AND MATERIALS ON PROPERTY 24 n.2 (1960) (citing *Johnson* in a footnote for its holding that some traditional rules of property were inapplicable to the “savage[]” Natives).

³⁴ *U.S. v. Alcea Band of Tillamooks* 329 U.S. 40 (1946); *Tee-Hit-Ton Indians v. United States* 348 U.S. 272 (1955).

³⁵ CHARLES DONAHUE, THOMAS KAUPER, PETER MARTIN, CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION (1974).

³⁶ RICHARD CHUSED, A MODERN APPROACH TO PROPERTY (1978).

³⁷ JOSEPH SINGER, PROPERTY LAW, RULES, POLICIES, AND PRACTICES 1289-1308 (1993).

³⁸ *Singer, supra* note 3, at 766-767.

Doctrine played in European conquest more generally and British conquest specifically, despite Justice Marshall's clear explanations in the case. Instead, Merrill and Smith describe its operative principle as the right of the first-in-time,³⁹ and Anderson and Bogart focus on the principle of certainty.⁴⁰ In other words, these authors extract purely ahistorical lessons from a case whose content is comprises a history of conquest and which also constitutes a landmark in that history itself.

B. The Erasure of Slavery

The arc of the erasure of the history of slavery follows a different pattern from that of the erasure of conquest from property law casebooks over time. Slavery appears as a ubiquitous property issue during the early period, as conquest appeared ubiquitously in treatises. By contrast, early property law casebooks included cases about slavery without reflection, critique, or even acknowledgment that property in people was by that time illegal and obsolete. During the era of Jim Crow, casebooks never described the history of slavery; they neither explained the significance, scale, or impact of the trade, nor the nature of the subjugation in these cases. Rather, they presented cases involving property in enslaved persons as natural; and as the number of these cases dwindled significantly in the 1930s, and by the late 1940s, disappeared, they replaced them with a new genre of cases affirming racial hierarchy and segregation—cases upholding racially restrictive covenants. This law soon fell, but without occasioning clear reflection on the law of race and property. Casebooks did not confront the history of slavery and the impact of its abolition on U.S. property law until the 1970s. They never did so widely or uniformly, and it remains exceptional to do so to this day.

The use of cases illustrating white entitlements to subordinate and control Black people in order to teach property law was an aspect of the legal culture of Jim Crow. To put the emergence of modern legal education in context, property in enslaved people had been obsolete and illegal for more than twenty years when Gray's casebook first appeared. Between that time and the abolition of slavery, federal troops had withdrawn from the South, allowing the white supremacist so-called "Redemption" movement to destroy Reconstruction; the Supreme Court had held that emancipation had no effect on debts or contracts for "slave consideration,"⁴¹ and struck decisive blows to efforts to extend civil

³⁹ THOMAS MERRILL AND HENRY SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 97-101, 119-20 (2017).

⁴⁰ JERRY L. ANDERSON AND DANIEL B. BOGART, *PROPERTY LAW: PRACTICE, PROBLEMS, AND PERSPECTIVES* 17-27 (2nd ed. 2019).

⁴¹ See, e.g., *White v. Hart*, 80 U.S. (13 Wall.) 646 (1872); *Osborn v. Nicholson*, 80 U.S. (13 Wall.) 654 (1872); *Boyce v. Tabb*, 85 U.S. (18 Wall.) 546 (1873). See generally, Andrew

rights and equal protection under law to Black people with decisions like *U.S. v. Cruikshank* in 1876 and the *Civil Rights Cases* in 1883.⁴² In the 1890s, through the turn of the century, the Court refused to intervene when southern states intensified their efforts to disenfranchise Black people;⁴³ the federal government sanctioned de jure segregation, the diminution of educational opportunities for Black people, and their legal and extralegal execution at the hands of whites.⁴⁴ During the same period, Ida B. Wells launched her national anti-lynching campaign, and the number of practicing Black attorneys was on the rise, prompting new obstacles to bar admission. The first Black lawyer, Macon Bolling Allen, was admitted to the Maine bar in 1844, but black attorneys “first appeared in significant numbers” in the post-Civil War South⁴⁵; in 1890, there were 431 Black lawyers in the country; almost 60% resided in formerly Confederate states.⁴⁶ These changes ushered in modern legal culture as we know it: Wisconsin instituted a written bar exam in 1865, followed by Virginia in 1896⁴⁷; law schools proliferated, many of which were for whites only, and the casebook tradition was born.

As a result, between 1870 and 1910, the overall number of lawyers in the country grew by 181% to a whopping 114,704 in 1910, but the number of Black lawyers among them was only 798.⁴⁸ In the Property Law classrooms of the burgeoning number of law schools, students read cases that presented white ownership of Black people as part of the natural order. All but two property law casebooks published between 1888 and 1915 that I examined contained cases

Kull, *The Enforceability After Emancipation of Debts Contracted for the Purchase of Slaves* 70 CHI. KENT. L. REV. 493, 504-6 (1994); John C. Williams, *Slave Contracts and the Thirteenth Amendment*, 39 SEATTLE U. L. REV. 1009 (2016).

⁴² *U.S. v. Cruikshank*, 92 U.S. 542 (1875); *Civil Rights Cases*, 109 U.S. 3 (1883).

⁴³ RICHARD M. VALLELY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT*, 132, 139 (2004); *Mills v. Green*, 159 U.S. 651 (1895).

⁴⁴ Vallely, *supra* note 43, at 139, 146; *Williams v. Mississippi*, 170 U.S. 213 (1898); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877* (1988).

⁴⁵ J. Gordon Hylton’s work combing through Census records reveals a “handful” of others joined Allen before the Civil War, including in Louisiana while slavery was still in force. In 1869, the year Howard Law School opened, George Lewis Ruffin became the first Black man to graduate from Harvard Law, and eventually, the first Black judge in Massachusetts. J. Gordon Hylton, *The African-American Lawyer, the First Generation: Virginia as a Case Study*, 56 U. PITT. L. REV. 107 (1994); see also J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944* (1993).

⁴⁶ Hylton, *supra* note 45, at 108.

⁴⁷ Michael Marshall, *Jim Crow Constitution Stifled Virginia’s Black Lawyers*, U. VA. SCH. L.: NEWS & MEDIA (Oct. 13, 2003), https://www.law.virginia.edu/news/2003_fall/hylton.htm

⁴⁸ Hylton, *supra* note 45, at 110-11.

either directly involving property in enslaved people or citing such cases.⁴⁹ These cases often involved questions of devise and inheritance, and illustrated lessons concerning statutes of limitation,⁵⁰ conversion,⁵¹ replevin,⁵² trover,⁵³ detinue,⁵⁴ trespass,⁵⁵ adverse possession,⁵⁶ gift and delivery,⁵⁷ ejectment,⁵⁸

⁴⁹ *Gray*, *supra* note 11; WILLIAM SULLIVAN PATTEE, *ILLUSTRATIVE CASES IN REALTY* (1896); CHRISTOPHER GUSTAVUS TIEDEMAN, *SELECTED CASES ON REAL PROPERTY: SELECTED AND ARRANGED FOR USE IN CONNECTION WITH THE AUTHOR'S TREATISE ON REAL PROPERTY* (1897); ELMER E. BARRETT, *CASES ON THE LAW OF REAL PROPERTY* (1898); WILLIAM A. FINCH, *SELECTED CASES ON THE LAW OF PROPERTY IN LAND* (1898); JASPER C. GATES, *CASES ON THE LAW OF REAL PROPERTY* (1898); GRANT NEWELL, *ELEMENTS OF THE LAW OF REAL PROPERTY, WITH LEADING AND ILLUSTRATIVE CASES* (1902); WILLIAM A. FINCH, *SELECTED CASES ON THE LAW OF PROPERTY IN LAND* (1904); JOHN CHIPMAN GRAY *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY* (1904); JOHN CHIPMAN GRAY, *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY* (1906); WILLIAM F. WALSH, *SELECT CASES ON THE LAW OF REAL PROPERTY* (1906); WILLIAM A. FINCH, *SELECTED CASES ON THE LAW OF PROPERTY IN LAND* (1912); *Burdick*, *supra* n. 30; EDWARD H. WARREN, *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY* (1915); 1919: HENRY A. BIGELOW, *INTRODUCTION TO THE LAW OF REAL PROPERTY; RIGHTS IN LAND* (1919); WILLIAM A. FINCH, *SELECTED CASES ON THE LAW OF PROPERTY IN LAND* (1919); EDWARD H. WARREN, *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY* (1919). *Cf.* JOHN ROOD, *DECISIONS, STATUTES AND CASES CONCERNING THE LAW OF ESTATES IN LAND* (1909); RALPH WILLIAM AIGLER, *TITLES TO REAL PROPERTY, ACQUIRED ORIGINALLY AND BY TRANSFER INTER VIVOS* (1916).

⁵⁰ *Brent v. Chapman*, 9 U.S. (1 Cranch) 358 (1809); *Bryan v. Weems*, 29 Ala. 423 (1856).

⁵¹ *Harvey v. Epes*, 12 Va. (1 Gratt.) 153 (1855) (people hired to work on a certain portion of a railroad were taken to another portion, where they died from the work).

⁵² *Fitch v. Newberry*, Doug. (1843) (citing a lawsuit where the Plaintiff provided medicines to a person enslaved by the Defendant without Defendant's knowledge); *Woodson v. Pearce*, 27 Tenn. (5 Sneed) 416 (1858) (slave owner sought recovery of property in several people, including a woman named Caroline).

⁵³ *Hepburn v. Sewell*, 5 H. & J. 211 (1821) (slave owner sought to recover the value of property in children named Sall, Patt, and Phillis).

⁵⁴ *Nelson v. Iverson*, 17 Ala. 216 (1850) (slave owner sought recovery of property in two people claimed by parol gift from his uncle).

⁵⁵ *Lewis v. McNatt*, 65 N.C. 63 (1871) (slave owner sought damages for loss of turpentine and injury to enslaved persons).

⁵⁶ *Chapin v. Freeland*, 142 Mass. 383 (1886) (citing numerous lawsuits for the recovery of enslaved persons).

⁵⁷ *McWillie v. Van Vacter*, 35 Miss. 428 (1858) (citing case about title to person set up through parol gift requiring delivery of possession).

⁵⁸ *Allen v. Mansfield*, 108 Mo. 343 (1892) (a formerly enslaved person claimed parol gift of the lot on which she resided); *Ewing v. Shannahan*, 20 S.W. 1065 (1892) (citing a case in which the guardian of minor children purchased people with the money of his wards).

standing,⁵⁹ partition,⁶⁰ community property,⁶¹ and charitable trusts.⁶² The broad variety of doctrines upon which these cases turned accords with Justin Simard's recent observation that "the law of slavery" included not only the laws governing the status, escape, punishment, and emancipation of enslaved people-- a category of laws now technically obsolete-- but the full variety of cases and doctrines comprising ordinary commercial law.⁶³ These cases also give us a glimpse of how the lives of enslaved people were impacted by their enslavers' health, indebtedness, and preferences between their children, and lawsuits brought by enslavers' squabbling family members and neighbors. In some cases, the disputes concerned the events through which they lost their lives, as with one woman who remains unnamed in an action for conversion, who died after being hired out for housework and then being forced to work in the fields.⁶⁴

An exceptional few casebooks during this period included cases that provided a perspectives on the legacy of slavery, the challenges Black people faced in acquiring and protecting their property rights, and even abolitionist sentiment. In 1898, for example, William Sullivan Pattee used the 1892 case *Allen v. Mansfield*⁶⁵ to illustrate the rule that an adverse possessor can acquire title only to that quantity of land she actually occupies. In this case, a woman named Malinda claimed a lot upon which she resided with her children in "a small house or shanty" enclosed by a fence by parol gift from her deceased enslaver; the court noted that "the evidence ends to show that she dug a well and planted some trees in the inclosed part, and that she, for a time at least, had a small pig-pen on the unenclosed part." Her former enslaver's family nonetheless sold the lot to a third party, who paid taxes on the lot and eventually sued to eject her. Though the lower court awarded Malinda title to the whole lot, on appeal, she was estopped from asserting title to the unenclosed part.

In 1914, William Burdick devoted an unusual 49 pages of his casebook to the entirety of a 1867 case that considered whether a charitable trust created for

⁵⁹ *Campbell v. Stakes* 2 Wend. 137 (1828) (citing *Bloss v. Holman* for the proposition that an enslaved person had no standing before the law).

⁶⁰ *Walker v. Sherman*, 20 Wend. 636, 655 (1839) (citing case "passing incidental stock" of people, cattle, and "implements").

⁶¹ *De Blane v. Lynch* 23 Tex. 25 (1859) (concerning crops made by the labor of persons belonging to a married woman on land she owned).

⁶² *Jackson v. Phillips*, 19 Mass. 539 (14 Allen) (1867) (discussing whether a trust created to further abolition is still may continue its activities after abolition).

⁶³ Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 87-88 (2020).

⁶⁴ *Hooks v. Smith*, 18 Ala. 338 (1850) (defendant "was clearly liable for her value"); see also *Harvey*, 12 Va. (1 Gratt.) at 153.

⁶⁵ *Allen v. Mansfield*, 108 Mo. 343 (1892).

abolitionist advocacy retained a valid charitable purpose after abolition. In *Jackson v. Phillips*, Justice Gray of the Supreme Judicial Court of Massachusetts used his opinion to review the history of the English slave trade and the history of slavery in Massachusetts, as well as the history of the law of charitable trusts. Toward the conclusion of that lengthy exposition, the judge stated plainly that “[n]either the immediate purpose of the testator—the moral education of the people; nor his ultimate object—to better the condition of the African race in this country; has been fully accomplished by the abolition of slavery.” He continued,

Negro slavery was recognized by our law as an infraction of the rights inseparable from human nature; and tended to promote idleness, selfishness and tyranny in one part of the community, a destruction of the domestic relations and utter debasement in the other part... Slavery may be abolished; but to strengthen and confirm the sentiment which opposed it will continue to be useful and desirable so long as selfishness, cruelty, the lust of domination, and indifference to the rights of the weak, the poor and the ignorant, have a place in the hearts of men.⁶⁶

As Burdick’s inclusion of this case demonstrates, even without explicit commentary, authors’ choices about the content of their property law casebooks reflected a wide range of views about slavery at the time.

For over a decade after 1915, most casebooks continued to reference several cases involving the trade of enslaved people as exemplary illustrations of property disputes.⁶⁷ However, in the 1930s and 40s, after significant activism protesting segregation and Jim Crow, the number significantly dwindled. Further, as casebook authors began to omit cases involving property in enslaved

⁶⁶ *Burdick, supra* n. 30.

⁶⁷ EDWARD H. WARREN, *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY* (1915); HENRY A. BIGELOW, *INTRODUCTION TO THE LAW OF REAL PROPERTY; RIGHTS IN LAND* (1919); WILLIAM A. FINCH, *SELECTED CASES ON THE LAW OF PROPERTY IN LAND* (1919); EDWARD H. WARREN, *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY* (1919); JOSEPH DANIEL SULLIVAN, *SELECTED CASES ON REAL PROPERTY* (1921); WILLIAM F. WALSH, *SELECT CASES ON THE LAW OF PROPERTY REAL AND PERSONAL* (1922); JOSEPH WARREN, *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF CONVEYANCES AND RELATED SUBJECTS* (1922); CHRISTOPHER GUSTAVUS TIEDEMAN AND GUY MERVIN WOOD, *CASES ON REAL PROPERTY: SELECTED AND ARRANGED FOR USE IN CONNECTION WITH THE AUTHOR'S TREATISE ON REAL PROPERTY* (1925); HARRY A. BIGELOW, AND FRANCIS W. JACOB, *CASES ON THE LAW OF PERSONAL PROPERTY* (1931); RAY ANDREWS BROWN, *CASES AND MATERIALS ON THE LAW OF REAL PROPERTY: A FIRST COURSE ON THE LAW OF REAL PROPERTY, CONSISTING OF THE LAW OF ESTATES IN LAND AND AN HISTORICAL INTRODUCTION* (1941); RALPH WILLIAM AIGLER, *CASES AND MATERIALS ON THE LAW OF TITLES TO REAL PROPERTY, ACQUIRED ORIGINALLY AND BY TRANSFER INTER VIVOS* (1942); HARRY A. BIGELOW AND WILLARD LELAND ECKHARDT, *CASES AND OTHER MATERIALS ON THE LAW OF PERSONAL PROPERTY* (1942).

people, they also began to omit the portions of decisions that cited cases involving property in enslaved people.⁶⁸ Most casebooks dropped *all* such cases, with a few exceptions; University of Chicago Law School Dean Harry Bigelow, for example, included many slavery cases in several editions of his casebook through 1942. After that, casebook authors adopted a new norm of totally erasing the history of slavery from the study of property law.

However, as they phased out traces of slavery from their casebooks in the 1930s and 40s, many casebook authors also began to incorporate cases that upheld the validity of racially restrictive covenants.⁶⁹ This incorporation, at this time, represents a delay in deeming this law important to the canon. After all, the use of racially restrictive covenants in the United States began in the 1890s, and the U.S. Supreme Court upheld the validity of racial covenants in *Corrigan v. Buckley* in 1926.⁷⁰ In another 1922 case upholding racial covenants that appeared in a 1933 casebook, *Parmalee v. Morris*, the Supreme Court of Michigan recited the Redeemers' notion that civil rights were "special treatment, writing that "the issue involved... is a simple one, i.e., shall the law applicable to restrictions as to occupancy contained in deeds of real estate be enforced or shall one be absolved from the provisions of the law simply because he is a negro?"⁷¹ Casebooks similarly delayed incorporating cases about racial zoning, which the Supreme Court had declared unconstitutional in 1917, though for even longer. Racial zoning did not appear in casebooks until 1948.⁷² That same year, that the Supreme Court finally invalidated racial covenants in *Shelley v. Kraemer*. Though authors incorporated *Shelley* into their casebooks relatively

⁶⁸ *Park*, *supra* note 10, at 1998.

⁶⁹ *Los Angeles v. Gary*, 181 Cal. 680 (1919) (Bentley 1933, 1940; Fraser 1941, 59-63); *Koehler v. Rowland*, 275 Mo. 573 (1918); (Bigelow and Tefft 1940, Brown 1941); *Meade v. Dennistone*, 173 Md. 295 (1938) (McDougal and Smith 1948). In *Letteau v. Ellis*, a California District Court of Appeals applied the doctrine of changed conditions to find that enforcement of a racial covenant no longer served the original purpose. *Letteau v. Ellis* 122 Cal.App. 584 (1932) (Burby 532-36, 1943).

⁷⁰ See Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541, 544 (2000); *Corrigan v. Buckley* 271 U.S. 323, 330 (1926).

⁷¹ *Parmalee v. Morris*, 218 Mich. 625 (1922), in BYRON R. BENTLEY, BUSINESS LAW OF REAL PROPERTY 264 (1933).

⁷² *Meade v. Dennistone*, 173 Md. 275 (1938), in MYRES SMITH AND DAVID HABER MCDUGAL, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT: SELECTED CASES AND OTHER MATERIALS ON THE LAW OF REAL PROPERTY: AN INTRODUCTION (1948).

quickly, they seem to have done so with thinly veiled reluctance: Aigler, for example, tucked a citation to the case into an unobtrusive footnote in 1951⁷³; Byron Bentley, who had included many cases validating racial covenants in prior editions, did not offer a substantive update of the law, but merely left out the overturned cases and cited *Shelley* without describing its holding in a hypothetical.⁷⁴

Though casebooks soon began to treat caselaw about racial zoning and racial covenants more thoroughly, they never provided historical explanation for the antagonism to Black property rights that they illustrate. Indeed, an Executive committee and the Supreme Court of the United States both proved willing to make the connection between the racialized landscape of property and the history of slavery in the United States before any property law professors were. In 1968, President Johnson's National Advisory Committee on Civil Disorders released the Kerner Report, which began its account with the history of slavery and racist institutional development after abolition, and characterized the racial unrest in 1967 as "the culmination of 300 years of racial prejudice." In 1968, in *Jones v. Alfred Mayer Company*, the Justices also held 7-2 that racial discrimination in housing constituted "badges and incidents of slavery" that the Thirteenth Amendment had empowered Congress to eliminate.⁷⁵

The first time a property law casebook articulated the connection between racial discrimination in housing and slavery did so obliquely: Donahue and his co-authors included *Jones* alongside *Johnson* and the sit-in cases in 1974. In 1978, Chused incorporated the first independent section on the history of slavery and the abolition movement to ever appear in a property law casebook, consisting of selections from *Dred Scott v. Sandford*, a discussion of limitations on Black mobility and citizenship during slavery, and the complicated legal issues involved in the transition to freedom.⁷⁶ A few others followed,⁷⁷ and in 1993, the first edition of Singer's casebook drew from *Dred Scott*, and a variety of other sources by historians and Critical Race Theorists.⁷⁸

⁷³ RALPH AIGLER, HARRY BIGELOW, AND RICHARD POWELL, CASES AND MATERIALS ON THE LAW OF PROPERTY 725 (1951).

⁷⁴ BYRON ROBERT BENTLEY, REAL ESTATE LAW WITH CASES, TEXT, AND FORMS 241 (1955).

⁷⁵ *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 441-443 (1968).

⁷⁶ Chused, *supra* note 36 at 635-683.

⁷⁷ SANDRA JOHNSON, ET AL. PROPERTY LAW, CASES MATERIALS, AND PROBLEMS 93 (citing DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR SOCIAL JUSTICE (1987)); CURTIS BERGER AND JOHN WILLIAMS, PROPERTY, LAND OWNERSHIP, AND USE 36-39, 1111-1119 (1997); GORDON HYLTON ET AL., PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS (1998), 28-31.

⁷⁸ JOSEPH SINGER, PROPERTY LAW, RULES, POLICIES, AND PRACTICES 1289-1308 (1993).

However, unlike with conquest, casebooks' initial reckonings with the history of slavery never led to new norms in content across casebooks. Some of the most widely used property law casebooks today do not mention slavery at all, or mention it only in passing.⁷⁹ The current edition of the leading casebook by Dukeminier and his coauthors, for example, mentions slavery exactly twice: first, in a footnote in reference to an English judge who opposed slavery in England, and second, in reference to John Locke's identification of an inherent right to property in one's person (en route to a discussion of property in human cells): "Slavery, obviously, was in opposition to that proposition," Dukeminier and his co-authors write, "but slavery has been abolished. So, can we now say, without qualification, that you have property in yourself?"⁸⁰ While here, Dukeminier's casebook conspicuously avoids the history and legacy of American chattel slavery, it elsewhere illustrates how easy it is to unknowingly reinforce erasure of the topic.

Like all property law casebooks and Bar examiners, Dukeminier uses the terms "Whiteacre" and "Blackacre" as legal kadigans for a hypothetical estate; uniquely, however, it also speculates about how these terms became traditional. After noting, "just why no one knows for sure," it offers the Oxford English Dictionary's suggestion that it was traditional to denote lands growing different crops by color ("peas and beans are black, corn and potatoes are white"), and the possibility of lands receiving rents ("black rents are payable in produce, white rents in silver"). However, the terms also constituted the title of a pro-slavery novel that Dukeminier's casebook does not mention, which appeared in 1856, the same year the Court decided *Dred Scott*, from a prominent Confederate press. William Burwell, the author of *Whiteacre vs. Blackacre*, was the son of a Virginia politician by the same name who served as private secretary to Thomas Jefferson, in the Virginia House of Delegates, and in the U.S. House of Representatives, and enslaved nearly 100 people. The younger Burwell was also a slaveowner, served in the Virginia House of Delegates, and his daughter Letitia followed him in writing books that vigorously defended slavery and "the Lost Cause."⁸¹ In Burwell's allegorical novel, which formed part of the literary response to Harriet Beecher Stowe's anti-slavery classic *Uncle Tom's Cabin*, "Whiteacre" was an incompetent northern farm and "Blackacre," a southern plantation labored upon by loyal, hardworking slaves.

⁷⁹ Anderson and Bogart, *supra* note 40; JOHN SPRANKLING AND RAYMOND COLETTA, PROPERTY, A CONTEMPORARY APPROACH (4th ed. 2018). For descriptive overview, see also Park, *supra* note 10, at 1998.

⁸⁰ JESSE DUKEMINIER, ET AL., PROPERTY 167 (9th ed. 2018).

⁸¹ LETITIA BURWELL, A GIRL'S LIFE IN VIRGINIA BEFORE THE WAR (1895); STEPHANIE JONES-ROGERS, THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH (2019).

It is indeed difficult to know just how the terms “White Acre” and “Black Acre,” which seem to have appeared fairly infrequently in English legal treatises,⁸² became popular as legal kadigans, but surely Burwell’s novel is a part of the story. Between ancient methods of denoting crops and Gray’s liberal use of the term “Black Acre” across his casebook, this novel likely raised American consciousness of these terms, in ways we cannot understand without studying the history of slavery and its impact upon American property law.

So far, scholars have not agreed on the importance of this endeavor. Though an imperfect metric, an analysis of the 25 most cited articles on the law of real property published between 1990 and 2015 shows that the topics of conquest and slavery remain exceedingly marginal.⁸³ Only two address these topics substantially, together and at all; one additional article mentions conquest in a footnote, and seven other articles mention slavery in a footnote, in passing, or referenced the abstract condition of enslavement rather than the history of American chattel slavery. The two scholars who discuss slavery and conquest in the history of American property law, offer observations that, if taken up, would require rethinking many fundamental presuppositions of the field. In *Whiteness as Property*, Cheryl Harris wrote that “[t]he legal legacy of slavery and of the seizure of land from Native American peoples is not merely a regime of property law that is (mis)informed by racist and ethnocentric themes”⁸⁴; rather, out of “the parallel systems of domination of Black and Native American people,” she explains, “were created racially contingent forms of property and property rights.”⁸⁵ In *Sovereignty and Property*, Singer analyzes Native nations’ property rights through American Indian Law decisions, including *Johnson*, to bluntly assert that “both property rights and political power in the United States

⁸² See, e.g., EDWARD COKE, FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLANDE, OR, A COMMENTARIE UPON LITTLETON (2d ed. 1629); FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 89 (5th ed. 1788). For an example of historical use of the Blackacre/Whiteacre terminology, see Sir Thomas Edlyne Tomlins, *The Law-Dictionary: Explaining the Rise, Progress, and Present State of the British Law* 441 (Payne 3d ed 1820).

⁸³ K-Sue Park, *Race and American Property Law*, in *The Oxford Handbook of Race and Law in the United States* (forthcoming) (Khiara Bridges, Devon Carbado, and Emily Houh eds. 2020); list compiled by Ted Sichelman for the “New Private Law” group at Harvard Law. Ted Sichelman, *Top 25 Most Cited Real Property Law Articles Published in the Last 25 Years*, NEW PRIVATE LAW: PROEJCT ON THE FOUNDATIONS OF PRIVATE LAW (June 2, 2015), <https://blogs.harvard.edu/nplblog/2015/06/02/top-25-most-cited-real-property-law-articles-published-in-the-last-25-years-ted-sichelman/> (describing his methodology at the end of the list).

⁸⁴ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1724 (1993).

⁸⁵ *Id.* at 1714.

are associated with a system of racial caste.”⁸⁶ This article builds on these observations, and the work of many scholars whose writing does not appear on this list, to offer an explanation of how the legacies of this history appear in the structure, practices, and institutions of property law.

II. “ACQUISITION,” OR EXPROPRIATION & THE PRODUCTION OF PROPERTY

Undoing the erasure of conquest and slavery from the property law canon does not only require new historical information. It requires rethinking the theoretical conclusions we draw from new understandings of practice about the dynamics and impact of institutions. To illustrate this process of revision, I begin, below, with the broad topic of “acquisition,” with which many property law courses and casebooks begin. Acquisition has typically appeared in property law as an abstract theoretical question about “how unowned things come to be owned.”⁸⁷ However, if we recognize that the most significant commodities in the colonies were land and enslaved people—if we begin with the premises that those lands belonged to sovereign Native nations, and the African people brought here were deprived of their inherent bodily autonomy and subjugated by force—we must acknowledge that historically, “acquisition” did not centrally concern “unowned things.”⁸⁸

Rather, in the English colonies, establishing claims to other people’s sovereign homelands and personhood constituted a process of collective expropriation, which exacted immeasurable costs from Indigenous and Black communities; colonists then rendered these resources *property* using legal strategies that have become hallmarks of the institutions that they engendered. In property law courses, the three main theories of acquisition—discovery, labor, and possession—describe how property interests arise in the first place and offer legal justifications for who holds title to property. Typically, they are presented as abstract rules about individual acquisition, which dictate that entitlements should be distributed to the “first-in-time,” on the basis of “labor” or “investment,” or to the party already in “possession,” to preserve the status quo, respectively. However, the history from which these theories arise shows that

⁸⁶ Joseph Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 5 (1991).

⁸⁷ Bethany Berger, *It’s Not About the Fox: The Untold History of Pierson v. Post*, 55 DUKE L. J. 1089 (2006).

⁸⁸ Gregory Ablavsky’s new book on federal property “begins with an indisputable reality, albeit one that Congress had earlier attempted to deny: the lands it carved up on paper were not empty.” He notes, “this simple fact had important consequences”: through dealing with the western territories, “the federal government was itself remade.” GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES* 2 (2021).

they each also guided collective processes of expropriation and property creation that inverted the abstract, conceptual principles for which they are now known. That is, the Discovery Doctrine rather nullified first-in-time rights, as it imposed a racial order on the world; the labor theory denied the labor of non-Europeans, the key labor force in the colonies; and the process of taking possession was one of subverting possession that made extractive, dispossessory techniques a part of the system for processing the resources thereby “acquired.”

The sections below describe how the Discovery Doctrine and the theories of labor and possession shaped the development of property law in the United States by establishing a fundamental hierarchy in the order of humanity as the basis of its jurisdictional and property claims and innovating practices and institutions to further English occupation in America and support the growth of the colonies. Part IIA addresses the international law of Discovery, which authorized European expeditions to conquer and enslave non-European people. By describing the evolution of the rule, I show how John Marshall’s rule in *Johnson v. M’Intosh* upheld the European hierarchy at its core within a colonization model of limited inclusion. Parts IIB and IIC turn to the history that Marshall references: how colonists took actual possession of the land, beginning in Part IIB(i) with how the labor theory linked ideas about non-European others to conceptions about the value of land. Part IIB(ii) describes how the English deployed law to create property in America. Many key features of the land system that give real estate its tremendous market liquidity today—the survey system, comprehensive title registry, and easy foreclosure—emerged as ways to resolve the technological challenges of conquest; further, colonists rendered enslaved people another major form of property and component of their own wealth with laws racializing slavery as an institution and disengaging it from the mission project from which it sprang. Part IIC reflects on the practices of dispossession that comprised colonists’ efforts to create this property, and the constant violence that was required to maintain possession of it. Through the examples of conquest by settlement and the fugitive slave controversies that arose as a response to enslaved people’s inherent self-possession, it considers the ways that dispossession and displacement became means of producing value in property that was primarily monetary and determined by race.

A. The Racial Hierarchy at the Heart of the Discovery Doctrine

Today, the Discovery Doctrine is taught as the law of finders-- the rule that the first to find a thing may keep it.⁸⁹ The 1823 case *Johnson v. M’Intosh* establishes the international law doctrine of discovery, which contains the principle of first-possession, as the basis of U.S. sovereignty and Native title as the origin of all land titles in the United States. In this section, I begin by describing how

⁸⁹ In property law classes today, a case involving rights to a baseball thrown to the crowd is most often used to teach an abstract version of this rule. *Popov v. Hayashi*, 2002 WL 31833731 (Cal. Superior Dec 18, 2002) (NO. 400545).

the international doctrine upon which *Johnson* drew developed, in order to highlight the constancy of discovery's basic legal fiction⁹⁰: a European claim of entitlement to non-European lands and people. In this context, the principle of first-in-time ordered relations between European nations vying for domination outside of Europe; insofar as this European project denied first-in-time entitlements in others, its operation was dependent on the hierarchical order privileging European Christian claims. The U.S. rule of discovery laid out in *Johnson* affirms this divisive inheritance, and adopts a model of limited inclusion by mapping out three categories of rights in relation to land and one another—those held by Native nations, private citizens, and the United States.⁹¹ In U.S. law, there is no clearer description of the structural racial determinants of American real property than that which appears in *Johnson*.

Slavery and conquest in America both stem originally from the same doctrinal root of the international law of Discovery, though from different points of its long history. The Discovery Doctrine was early articulated through the Roman Catholic Church's notion that it had worldwide papal jurisdiction and the duty to build a universal Christian Commonwealth.⁹² During the period of the Crusades, canon lawyers developed the idea that "holy war" waged by Christians against infidels was "just war." In the thirteenth century, Pope Innocent IV focused on Christians' legal authority to dispossess non-Christians of *dominium*—a claim to land entailing both sovereignty and property.⁹³ In the fifteenth century, Portuguese and Spanish raids of islands off the Iberian Coast prompted Pope Eugenius to issue a papal bull in 1436 affirming Portuguese claims that

⁹⁰ The fiction is denoted by the very term "Discovery," which suggests that the "things" to which colonists laid claim were unowned and available for Europeans to take.

⁹¹ Dukeminier's casebook calls Marshall's elaboration of the racial justification for conquest "discomfiting," and explains that "prior possession by aboriginal populations (which were sometimes called savage populations, or semi-civilized ones), was commonly thought not to matter." *Dukeminier et al., supra* note 80, at 12. This legal fiction was also a source of discomfort for Marshall, who, notwithstanding his own racism, called European discovery claims "extravagant" and "pompous" in *Johnson*. *Johnson v. M'Intosh*, 21 U.S. 543, 590 (1823).

⁹² ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C. 1500-C.1800* (1998); ROBERT WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); ALLAN GREER, *PROPERTY AND DISPOSSESSION: NATIVES, EMPIRES, AND LANDS IN EARLY MODERN NORTH AMERICA* (2017).

⁹³ Pope Innocent IV 1240; influencing de Vitoria and Grotius. See ROBERT MILLER, JACINTA RURU, LARISSA BEHRENDT, TRACEY LINDBERG, *DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES* 9 (2010); *Williams, supra* note 92, at 13-18, 24, 28-32; *Pagden, supra* note 93, at 8, 24, 126. Brian Slattery, *Paper Empires: The Legal Dimensions of French and English Ventures in North America*, in JOHN MCLAREN, A.R. BUCK AND NANCY E. WRIGHT, EDS. *DESPOTIC DOMINION: PROPERTY RIGHTS IN BRITISH SETTLER SOCIETIES* 50-78 (2005).

their conquests were on behalf of Christianity. The *Romanus Pontifex* justified conquest by referring to the savage ways of infidel natives, in arguments that Pope Nicolas repeated in the *Dum Diversas* of 1452 and another *Romanus Pontifex* in 1455. These papal bulls authorized Portugal's ongoing entry into West Africa to seize and enslave people, through which the Portuguese initiated the transatlantic slave trade, and which the English joined in the seventeenth century, after their successful establishment of colonies in mainland America and the Caribbean.

Around the turn of the sixteenth century, disputes between Spain and Portugal about their "first discovery" rights prompted new articulations of the Discovery Doctrine with three important, lasting features. First, Pope Alexander VI established a principle of *noninterference* in conquest with his *Inter Caetera II*, which in 1493 demarcated a north-south boundary line about 300 miles west of the Azore Islands, separating Spain's western zone of "discovery" from Portugal's eastern zone.⁹⁴ Second, in 1532, the interventions of Franciscus de Victoria, lead advisor to the King of Spain, revised the fundamental principles of conquest to base them not only on excluding non-Christians from the realm of humanity, but on their *inclusion* under a European-led Law of Nations. Against a host of scholarly opinions to the contrary,⁹⁵ Victoria argued that Indians had reason and natural law rights of *dominium*.⁹⁶ However, he added, Europeans had rights "to travel in the lands in question... and the natives may not prevent them"; if Native people violated European-defined "natural law," or the Law of Nations, Europeans would be justified in waging "just war" against them.⁹⁷ The difference between inclusion and exclusion models of conquest was famously debated in 1551 in Valladolid by Bartolomé de Las Casas and Juan Ginés de Sepúlveda, who argued that "Indians" were "natural slaves." In contrast to a model where Native people were wholly excluded from the realm of law, with no "right to have rights," as it were, in the new model of formal inclusion, Native people held certain rights, but not rights to determine their meaning, scope, or enforcement.⁹⁸

Third, Victoria shifted the legal basis of authority for conquest from papal sanction to customary international law, creating new opportunities for England and France to make claims and articulate discovery rules that justified them. For example, Spain and Portugal had long claimed that their Discovery rights began upon their mere arrival in non-Christian lands, and were consummated

⁹⁴ With the Treaty of Tordesillas in 1494, Spain and Portugal modified that line. *Pagden*, *supra* note 93, at 48.

⁹⁵ *Williams*, *supra* note 92.

⁹⁶ *Id* at 92; ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

⁹⁷ *Williams*, *supra* note 92, at 101.

⁹⁸ *Anghie*, *supra* note 96.

through performative rites, such as planting flags or crosses on the shore.⁹⁹ Though Holland, France, and England also all long made claims based on similar rituals,¹⁰⁰ they also pursued other arguments,¹⁰¹ and into the seventeenth century, England embraced the idea that “discovery” encompassed an additional requirement, beyond first arrival—being the first to achieve actual possession, or occupation. Following an understanding of English rights highly influenced by Victoria’s ideas, conveyed to the English-speaking public through George Peckham’s “True Reporte,”¹⁰² the English pursued their rights to trade in America and to be accepted in this traffic by Native peoples under the Law of Nations, on pain of provoking “just war.”¹⁰³

Johnson v. M’Intosh draws from this repertoire of arguments from international and recapitulates the last chapter of its history to articulate a version of the Discovery Doctrine for U.S. law. *Johnson* specifically concerned the question of *dominium*, or sovereignty and property in land, not the enslavement of people (though in a decision two years later called *The Antelope*, Marshall identified the theory of just war as the positive law origin of the transatlantic slave trade).¹⁰⁴ Marshall explained that acquisition, or appropriation, was the impetus of the discovery rule: “[o]n the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire.” The doctrine, he wrote, was a non-compete agreement between European nations, determined by the law of Nations¹⁰⁵: “as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves.”¹⁰⁶ In Marshall’s articulation of the rule, “discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European

⁹⁹ PATRICIA SEED, CEREMONIES OF POSSESSION IN EUROPE’S CONQUEST OF THE NEW WORLD, 1492-1640 9, 69-73, 101-102 (1995).

¹⁰⁰ See *Miller et al.*, *supra* note 93, at 20-21 (noting parallels between these rituals of “hanging and burying plates and coins, and painting signs and planting their crosses and flags in the soil” to English feudal practices of transferring ownership livery of seisin).

¹⁰¹ *Id.* at 16; HANS S. PAWLISCH, SIR JOHN DAVIES AND THE CONQUEST OF IRELAND: A STUDY IN LEGAL IMPERIALISM 34 (1985); *Williams*, *supra* note 92, at 136-38 n.11.

¹⁰² *Williams*, *supra* note 92, at 166-69.

¹⁰³ *Miller et al.*, *supra* note 93.

¹⁰⁴ Marshall focuses on just war, though historical evidence shows that most slavery did not result from captives taken in war.

¹⁰⁵ Natsu Taylor Saito, *Race and Decolonization: Whiteness as Property in the American Settler Colonial Project*, 31 HARV. J. ON RACIAL & ETHNIC JUST. 31, 50.

¹⁰⁶ *Johnson v. M’Intosh*, 21 U.S. 543, 590 (1823).

governments, which title might be consummated by possession.” Discovery claims, he found, had passed through sovereign chains of title from different first-in-time conquerors-- Britain, Spain, and France-- to the United States, by various treaties and purchase.¹⁰⁷

In *Johnson*, as in other iterations of discovery, it is important to note that the first-in-time rule had no meaning without the hierarchy that subordinated non-Christian, non-European dominium to European claims. The operative element of the agreement between European nations competing for conquests was the conceit of discovery itself, not the subsidiary rules of its order; without the hierarchy that placed their entitlements above others, and the correspondent fictions about those peoples—their lack of reason, their bestiality, their need to be “saved”—they would have had to leave first possessors elsewhere undisturbed.¹⁰⁸ This primacy however does not render the rule of the first-in-time meaningless, but rather highlights an important aspect of the racial legal world that conquest engendered—selective application of rules according to hierarchy. In accordance with this principle of hierarchy, Marshall accepted that European “title by conquest[,] acquired and maintained by force,” was the unequivocal source of the United States’ sovereignty, and justified this inheritance with his own nineteenth century iteration of the traditional narrative: “the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy.”¹⁰⁹

Within this hierarchy, it is equally crucial to observe, *Johnson* did not deny Native nations’ sovereignty and rights. Reflecting an understanding of the history of colonists’ transactions with Native peoples, Marshall acknowledged Native nations’ original, ubiquitous claims:

the whole of the territory, in the letters patent described... was held, occupied, and possessed in full sovereignty, by various independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory, and the absolute owners and proprietors of the soil; and who neither acknowledged nor owed any allegiance or obedience to any European sovereign or state whatever.

¹⁰⁷ Treaty of Paris, Louisiana Purchase. *See id.*

¹⁰⁸ Dukeminier calls Marshall’s racial justifications “discomfiting,” and explains that “prior possession by aboriginal populations (which were sometimes called savage populations, or semi-civilized ones), was commonly thought not to matter.” *Dukeminier, supra* note 80, at 12. This legal fiction was also a source of discomfort for Marshall, who, despite his own racism, called European discovery claims “extravagant” and “pompous.” *Johnson*, 21 U.S. at 590.

¹⁰⁹ This articulation built upon previous rationales for the Discovery Doctrine, which, in its various iterations, were religious, cultural and civilizational, and cultural differences. *See* K-Sue Park, *Race, Innovation and Financial Growth, The Example of Foreclosure, in* HISTORIES OF RACIAL CAPITALISM (Destin Jenkins and Justin Leroy eds., 2020); NANCY SHOEMAKER, *A STRANGE LIKENESS: BECOMING RED AND WHITE IN EIGHTEENTH CENTURY NORTH AMERICA* (2004); *Williams, supra* note 92.

Instead of excluding or refusing to acknowledge Native title, under a model of inclusion, with limitations, the Court assumed its prerogative to define its parameters under U.S. law. The heart of the factual dispute in *Johnson*, indeed, turned precisely on the legal question of how the United States' option rights, under the international law of discovery, affected the inherent, natural sovereignty of Native nations-- in Marshall's words, the question of "the power of the Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country."¹¹⁰ The facts involved the pretense that the parties took title to the same land from different parties¹¹¹-- the U.S. government (M'Intosh)¹¹² and the Illinois and Wabash Land Company (Johnson), which purchased directly from the Piankeshaw and Illinois nations.¹¹³

Under Marshall's analysis, the inter-European Discovery principle was the basis of an "absolute, ultimate" sovereignty,¹¹⁴ "*subject only to the Indian title of occupancy*,"¹¹⁵ that gave the United States the power to could prescribe the laws of sovereignty and property within the lands that it therewith affirmed as its domain: "the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie." In *Johnson*, Marshall exercised that authority to recognize Native nations' *dominium*, in keeping with a long and undeniable tradition of British practice of purchasing their lands; further, he prohibited states and private entities from terminating that title, and placed important limits on the scope of the United States' power to do so.¹¹⁶ The United States, he wrote, "maintain... an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."¹¹⁷ The federal government's right to terminate Native title, though exclusive, was in other words limited to two approaches: *consensual* purchase or war, which Marshall

¹¹⁰ *Johnson*, 21 U.S. at 572.

¹¹¹ The land claims did not actually conflict, and that the case was a case of collusion intended to produce an answer on the legal question of valid chains of title. See LINDSAY ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2007).

¹¹² Which purchased it from the Illinois and Piankeshaw nations.

¹¹³ Murray and Vivot, who negotiated these purchases, chose strategically to deal with the Piankeshaw when they were devastated by disease and war, rather than stronger tribes that claimed the same land.

¹¹⁴ *Johnson*, 21 U.S. at 592.

¹¹⁵ *Johnson*, 21 U.S. at 562.

¹¹⁶ *Id.* at 572. My reading of *Johnson* here generally follows that in Joseph Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALBANY GOV'T L. REV. (2017). See also Singer, *supra* note 3 at 767.

¹¹⁷ *Id.* at 587.

nine years later clarified had to be *defensive* war.¹¹⁸ With this rule, *Johnson* also affirmed the prohibitions on state and private purchasers—whose abuses and predations were a major problem at the time-- that Congress had enacted legislatively many years before in its Trade and Intercourse, better known as Non-Intercourse Acts.¹¹⁹ It made the United States the only entity to which Native nations could freely transfer title to land, in a restraint on alienation, which Singer has likened to a right of first refusal.¹²⁰ By the same stroke, it therefore declared that Native nations' sovereign rights were not full rights of self-determination, and confirmed the United States' "extravagant" assertions about the European entitlements it inherited¹²¹-- an inheritance of domination that Marshall captured in the famous line, "Conquest gives a title which the Courts of the conqueror cannot deny."¹²²

Despite subsequent events and legal developments after *Johnson* that further diminished the geographical and legal scope of these rights, the amount of land under Native *dominium* today remains approximately equivalent to that held by California.¹²³ The limitations it affirmed on state and private actors' ability to directly purchase land from Native nations remain the cause of action in live disputes.¹²⁴ Further, the fact that "*all land titles in the United States originate in Indian title*," as Joseph Singer has repeatedly underscored, has enormous moral, practical, and systemic consequences for *all* privately held lands in the country.¹²⁵ On the one hand, the central presumption of European hierarchy that fueled conquest creates overarching, ongoing problems of legitimacy. As Singer points out, the extent to which "our land titles originate in the *dispossession* of first possessors places subsequent titles in doubt," as a matter of the legitimacy of ownership claims *and* the normative justifications for property

¹¹⁸ Marshall clarified in 1832 that such war had to be defensive. *Worcester v. Georgia*, 31 U.S. 515 at 580 (1832). See also Singer, *supra* note 116, at 31.

¹¹⁹ Northwest Ordinance of 1787, U.S.C.A. § NORTHWEST ORDINANCE; Trade and Intercourse Acts of 1790, 1796, 1800, § 1:11. The Trade and Intercourse Acts period: 1789 to 1887, American Indian Law Deskbook § 1:11.

¹²⁰ Singer, *supra* note 116.

¹²¹ Singer compares limitations on this type of title to limitations on private ownership: "Indian title is an estate in land, but the package of rights it entails is different from the package associated with the typical fee simple." *Id.* at 7.

¹²² *Johnson*, 21 U.S. at 587-88.

¹²³ Elizabeth Reese, *The Other American Law*, 73 Stanford L. Rev. (2021).

¹²⁴ A 2005 Ginsburg decision dismissing tribal claims on the basis of laches doctrine placed substantial but not insuperable barriers to such claims. See *Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*).

¹²⁵ Singer, *supra* note 116, at 9; See also Singer, *supra* note 3, at 766.

rights in the United States.¹²⁶ Finally, the sovereign's right "to prescribe those rules by which property may be acquired and preserved,"¹²⁷ which *Johnson* shows derive from conquest in the United States, made those rules of property a tool of conquest itself, in ways that the next two sections will explore.

In other words, in addition to broad question of legitimacy and morality, the legacy of dispossession also resides within many structural aspects of the system of property law itself. By examining the way that English colonists established and grew their settlements, the next section highlights the ways that English colonists used and innovated property laws to further their taking possession of, or expropriating native nations' lands and African people's bodies. In other words, what English colonists did in relation to Native nations to achieve *Johnson*'s second step of possession—these relations which "were to be regulated by themselves"¹²⁸-- developed the property system and market in lands for which *Johnson*, two centuries on, would clarify rules to shore up the certainty of transactions, and thereby support its continuous growth.¹²⁹

B. The Labor of Producing Property in Theory and Practice

The labor theory of property concerns the processes by which property is produced, and identifies entitlement in the party that invests their labor to create the value of that property. It is intimately connected to the Discovery Doctrine as a justification for entitlement, and the two theories should be understood in their historical relation, rather than simply as alternative, abstract principles. In colonial America, colonists achieved the second step of *Johnson*'s discovery rule—taking actual possession of the country—by expropriating resources and rendering them property. This section addresses how the labor theory's account about property creation describes the historical process of property creation in the colonies. The labor of conquest entailed expropriating others' lands and bodies as well as the use of laws and development of institutions to render those entities into property. The labor theory captures this development in its long-lasting and influential narratives about Native people and how, in Marshall's words from *Johnson* two centuries after colonists' first arrival, that "to leave them in possession of their country was to leave the country a wilderness."

In its abstract form, the theory of acquisition that anchors entitlements in labor points to the morale rationales of desert, efficiency, and the prevention of

¹²⁶ He points out these historical injustices may be the basis for demands for restoration and reparation, as well as litigable claims under U.S. law. *Singer*, *supra* note 116, at 10.

¹²⁷ *Johnson*, 21 U.S. at 572.

¹²⁸ "The Rights thus acquired being exclusive, no other power could interpose between them." *Johnson*, 21 U.S. at 543, 573.

¹²⁹ In the sense that rules "easily administered and applied" contribute to "peace and order." *Anderson and Bogart*, *supra* note 40, at 17.

waste.¹³⁰ Part IIB(i) examines these ideas in the most famous articulation of the labor theory-- Locke's account of producing property-- to show how in its colonial context, under the umbrella of the "discovery" hierarchy, it imbricated racial ideology with the creation of property value. That is, the labor theory not only generated *ideas* about "Indians," but intrinsically linked those ideas to conceptions about the value of the land by suggesting that Europeans cultivated land, while Native peoples left it to "waste"; there is no mention of enslaved labor.¹³¹ If we understand the account as primarily about agricultural practices in the colonies, this European exceptionalism is known to be a bald racial lie. However, I argue in Part IIB(ii) that this exceptionalism is correct if we understand Locke to refer to the labor of property production more broadly, which is romanticized by focusing on agrarian elements alone. In many unique and institutionally significant ways, colonists worked to make land and people cognizable as "property" under law: they developed systems for comprehensive title registration, rectangular surveys, land grants and homesteading incentives, the principle of *partus sequitur ventrem* and antimiscegenation laws, and easy foreclosure, to change the very meaning of the concept of property itself. These new property rules and institutions governed the removal and enslavement of Native and African people in order to manufacture value that was both dependent on evolving ideologies about those groups' racial difference and monetary above all.

1. Locke's Theory of Property Creation

Locke's writing on property in the *Second Treatise* most famously captures the idea that "Whatsoever [one] removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joined to it something that is his own, and thereby makes it his *Property*." Locke's ideas on property and government heavily influenced the Founders, especially Thomas Jefferson, who drew on the *Second Treatise* to draft the Declaration of Independence. Locke was an aide to the Earl of Shaftesbury, secretary to the Lord Proprietors of Carolina, the Council of Trade and Plantations, and a member of the Board

¹³⁰ Most property law courses teach the theory of labor and investment as a source of entitlement using the case *INS v. Associated Press. Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918).

¹³¹ For Locke, only "just war" could justify enslavement. JOHN LOCKE, *THE SECOND TREATISE* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

of Trade, the part of English government responsible for colonial administration.¹³² He read widely about colonial expeditions,¹³³ and wrote many memoranda and policy recommendations while in these positions on the various colonies, settlement projects, and the institution of government and property in America, including the Fundamental Constitutions of Carolina and its agrarian laws, as well as a reform proposal for Virginia in 1696. He was also an investor in the Company of Merchant Adventurers to trade with the Bahamas and the Royal Africa Company, which held the Crown's monopoly on the English slave-trade until the late seventeenth century.¹³⁴ In another example of another lacuna fostered by erasure, though the commentary on Locke's writings that has accumulated since his lifetime would fill libraries, the first article to consider his theories in relation to his involvement in the colonizing project in America did not appear until the mid 1980s, three centuries after the publication of the *Second Treatise*¹³⁵; scholars began to examine Locke's ideas about slavery in light of his investments in the trade only slightly earlier, beginning in 1969.¹³⁶

Locke's labor theory, in keeping with the English rule of discovery, acknowledges some fundamental rights to property in Native peoples. He argues, for example, that "the wild Indian," like all others, derives property rights from his labor in the hunter-gatherer context: if he harvests a nut or gives chase to a deer to kill it, Locke offers, he too is entitled to "the Fruit, or Venison."¹³⁷ However, Locke also acknowledges that his main purpose in the exposition is to describe rights in land, "the *chief matter of Property* being now not the Fruits of the Earth, and the Beasts that subsist on it, but the *Earth it self*." Of land, he writes,

... I think it is plain, that *Property* in that too is acquired as the former. *As much Land* as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his *Property*. He by his Labour does, as it were, inclose it from the Common.

¹³² James Tully, *Rediscovering America: the Two treatises and aboriginal rights*, in JAMES TULLY, *AN APPROACH TO ANALYTICAL PHILOSOPHY: LOCKE IN CONTEXTS* 137, 140 (Quentin Skinner ed. 1993).

¹³³ JOHN HARRISON, JOHN AND PETER LASLETT EDS., *THE LIBRARY OF JOHN LOCKE* (1965).

¹³⁴ Tully, *supra* note 132, at 141; Banner, *supra* note 7, at 47; David Armitage, *Locke, Carolina, and the Two Treatises*, 32 *POL. THEORY* 602 (2004).

¹³⁵ Herman Lebovics, *The Uses of America in Locke's Second Treatise of Government*, 47 *J. HIST. IDEAS* 567 (1986); Tully, *supra* note 132, at 137. See also Barbara Arneil, *Trade, Plantations and Property: John Locke and the Economic Defense of Colonialism*, 55 *J. HIST. IDEAS* 591 (1994).

¹³⁶ DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 118-21 (1969); James Farr, *So Vile and Miserable an Estate: The Problem of Slavery in Locke's Political Thought*, 14 *Political Theory* 263 (1986); Wayne Glasser, *Three Approaches to Locke and the Slave Trade*, 51 *Journal of the History of Ideas* 199 (1990).

¹³⁷ Locke, *supra* note 131, at 287, 289.

His specific description of the kind of labor that creates entitlements to lands categorically excludes “the wild Indian,” who, he has said, “knows no Inclosure, and is still a tenant in common.”¹³⁸ In other words, this theory echoed a massively popular English characterization of Native people as less civilizationally developed than Europeans, to explain that while they had certain fundamental rights, they could not claim property in land.

Locke’s, like older variations of the colonial labor theory, as we will see, portrays colonists as producing “property” in land-- not the Native people from whom they took that land, nor the African people, not mentioned in the text, who they forced to labor upon it. As pertains to the agricultural labor of “tilling” and “planting,” this representation was patently untrue in the colonies, exemplifying another selective application of theory according to the hierarchy of the Discovery Doctrine. The principal source of labor that colonists relied on for the production of their cash crops, including tobacco, rice, and cotton, were, of course, the people that they enslaved. Their forced importation to the Americas began in the early sixteenth century by Spain, followed soon after by Portugal, to supplement the labor of enslaved Native peoples in the Caribbean and later, the mainland.¹³⁹ The English, French, and Dutch joined the African slave trade in the early seventeenth century¹⁴⁰: the first record of English colonists’ purchase of Africans was in 1619, from Dutch slavers in Virginia¹⁴¹; in the 1630s, the first records of Black slaves in Pennsylvania and Maryland appeared, and Massachusetts constructed the first vessel for the slave trade, which first brought enslaved Africans to Connecticut in 1637.¹⁴²

In the 1660s and through the 1680s, the number of enslaved persons began to burgeon in the colonies as the Crown promoted African enslaved labor through its monopoly company¹⁴³ and colonists increasingly built their trade with Barbados.¹⁴⁴ In 1683, Colonel Nicholas Spencer, secretary of Virginia,

¹³⁸ *Id.* at 287.

¹³⁹ HUGH THOMAS, *THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE: 1440-1870* 92-113 (1999).

¹⁴⁰ *Id.* at 153-62.

¹⁴¹ A. LEON HIGGINBOTHAM JR., *IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS* (1978).

¹⁴² *Thomas, supra* note 139, at 177. See also WENDY WARREN, *NEW ENGLAND BOUND: SLAVERY AND COLONIZATION IN EARLY AMERICA* (2016).

¹⁴³ Perhaps motivated by a desire to preserve English servant labor for the home country, Charles II “invite[d] all of his subjects to subscribe to a new joint stock”—the Royal African Company. ANTHONY S. PARENT, JR., *FOUL MEANS: THE FORMATION OF A SLAVE SOCIETY IN VIRGINIA 1660-1740* 60 (2003).

¹⁴⁴ *Id.* at 67.

boasted that “Blacks can make [Tobacco] cheaper than Whites”¹⁴⁵; between 1670 and 1690, the population increased from 2,000 to 5,000, to comprise 9 percent of Virginia’s population and more than ½ of its bound labor force.¹⁴⁶ The *Second Treatise*, which appeared during this time, never mentioned enslaved Africans and justified slavery only on the basis of just war-- referencing contemporary arguments for enslaving Native people¹⁴⁷ and also, perhaps, the tradition of discovery that gave birth to the transatlantic slave trade.¹⁴⁸ By 1710, the number of enslaved Black people in the colony was estimated at “upwards 15,000” and constituted “the mass of bound laborers; in Anthony Parent’s words, “Virginia had become a slave society.”¹⁴⁹

Similarly, Locke’s evolutionary narrative characterizes Indigenous land use in a way that was “simply counterfactual, and the settlers knew it.”¹⁵⁰ The English notion that Native people left land to “lye waste and free” contradicted the numerous written observations colonists left describing the Native towns, villages, and “carefully cultivated,” orderly crop systems they found up and down the eastern seaboard.¹⁵¹ In Jamestown, John Smith reported that “Each

¹⁴⁵ *Id.* at 60.

¹⁴⁶ *Id.* at 74.

¹⁴⁷ See generally Brad Hinshelwood, *The Carolinian Context of John Locke’s Theory of Slavery*, 41 *Political Theory* 562 (2013).

¹⁴⁸ See discussion of Marshall and *The Antelope* above. In 1698, Locke urged the Royal Governor of Virginia to address the abuse of enslaved people, though not their fundamental condition of enslavement, and to “get a law pass’d restraining of inhumane Severities... towards Slaves.” *Farr, supra* note 136, at 269; Jennifer Welchman, *Locke on Slavery and Inalienable Rights*, 25 *CAN. J. PHIL.* 67, 74 (1995).

¹⁴⁹ *Parent, supra* note 143, at 79.

¹⁵⁰ *Saito, supra* note 105, at 52.

¹⁵¹ *Id.* at 52; Karen Ordahl Kupperman, *SETTLING WITH INDIANS: THE MEETINGS OF ENGLISH AND INDIAN CULTURES IN AMERICA, 1580-1640* 81-84 (1980); *SAILORS NARRATIVES OF VOYAGES ALONG THE NEW ENGLAND COAST 1524-1624* 19 (George Parker Winship, ed. 1905); Thomas Hariot, *A BRIEF AND TRUE REPORT OF THE NEW FOUND LAND OF VIRGINIA* 19-20 (London, 1588); *THE ENGLISH NEW ENGLAND VOYAGES, 1602-1608* (David B. Quinn and Alison M. Quinn, eds. 1983); *JOHN SMITH, A TRUE RELATION OF SUCH OCCURRENCES AND ACCIDENTS OF NOOTE AS HATH HAPNED IN VIRGINIA* (London, 1608); *THE JAMESTOWN VOYAGES UNDER THE FIRST CHARTER 1606-1609* 173 (Philip L. Barbour, ed. 1969); *WILLIAM BRADFORD, OF PLYMOUTH PLANTATION, 1620-1647* 85 (written 1630-1650) (Samuel Eliot Morison, ed. 1952); Linda S. Cordell and Bruce D. Smith, *Indigenous Farmers*, in *THE CAMBRIDGE HISTORY OF THE NATIVE PEOPLES OF THE AMERICAS* 201-266 (BRUCE G. TRIGGER AND WILCOMB E. WASHBURN, eds. (1996); *Thomas, supra* note 139, at 103-13.

household knoweth their owne lands & gardens”¹⁵²; and in 1709 in North Carolina, John Lawson observed that Native groups “have no Fence to part one anothers Lots in their Corn-Fields; but every Man knows his own, and it scarce ever happens, that they rob one another of so much as an Ear of Corn.”¹⁵³ Stuart Banner points out that English property arrangements of the time were strikingly similar to many Native groups’ practices, which allocated farming plots to families and maintained common resource areas for the community; the English, like some Native communities, also planted fields together and separated different family’s rows by a narrow strip of grass.¹⁵⁴ While colonists imported fixed-field agriculture practices from England, as Peter Thomas notes, swidden systems, like those used by Native groups in the Connecticut River Valley and “throughout the world have frequently produced equal, or even higher, returns than fields under continuous cultivation.”¹⁵⁵

Importantly, the labor theory generated ideas about Native peoples that not only suggested their inferiority, but also emphasized the impact of their possession on the *value* of the land. In this respect, Locke’s summary merely echoed older and well-known colonial accounts. In 1609, for example, the Puritan preacher Robert Gray invoked the popular idea

that these savages have no particular propriety in any part of parcel of that country, but only a general residency there, as wild beasts in the forest; for they range and wander up and down the country without any law or government, being led only by their own lusts and sensuality. There is not *meum* and *tuum* amongst them. So that if the whole land should be taken from

¹⁵² John Smith, *A Map of Virginia* 355, 371 (1612), in BARBOUR, JAMESTOWN VOYAGES; ALEXANDER WHITAKER, *GOOD NEWS FROM VIRGINIA* 26-7 (London, 1613); Edward Winslow, *Good Newes from New England* (London, 1624), in *CHRONICLES OF THE PILGRIM FATHERS* 361 (Alexander Young, ed. 1844); WILLIAM PENN, *A LETTER FROM WILLIAM PENN... TO THE COMMITTEE OF THE FREE SOCIETY OF TRADERS* 6 (London, Andrew Sowle ed., 1683); JOHN LAWSON, *A NEW VOYAGE TO CAROLINA* 19 (London, 1709); JOHN SMITH, *A DESCRIPTION OF NEW ENGLAND* 33-34 (London: Robert Clerke, 1616); *Williams, supra* note 92, at 211 note 100. (citing *THE JAMESTOWN VOYAGES UNDER THE FIRST CHARTER 1606-1609* 371 (P.L. Barbour ed. 1969)).

¹⁵³ *Id.*; *Lawson, supra* note 152, at 179.

¹⁵⁴ *Shoemaker, supra* note 109, at 13-34; R. DOUGLAS HURT, *INDIAN AGRICULTURE IN AMERICA: PREHISTORY TO THE PRESENT* 65-67 (1987); Anthony F.C. Wallace, *Political Organization and Land Tenure among the Northeastern Indians, 1600-1830*, 13 *SOUTHWESTERN J. ANTHROPOLOGY* 301-321 (1957); WILLIAM BARTRAM, *TRAVELS THROUGH NORTH & SOUTH CAROLINA, GEORGIA, EAST & WEST FLORIDA* 325 (Philadelphia, 1791); John Bellers, *An Essay Toward the Improvement of Physick* (London, 1714), in *JOHN BELLERS 1654-1725: QUAKER ECONOMIST AND SOCIAL REFORMER* (A. Ruth Fry ed. 1935); *Locke, supra* note 131.

¹⁵⁵ PETER THOMAS, *IN THE MAELSTROM OF CHANGE. THE INDIAN TRADE AND CULTURAL PROCESS IN THE MIDDLE CONNECTICUT VALLEY 1635-1665* 113 (1979).

them, there is not a man that can complain of any particular wrong done unto him.¹⁵⁶

In 1629, John Winthrop wrote in New England, “This savage people ruleth over many lands without title or property, for they enclose no ground”¹⁵⁷; and Locke’s contemporary William Loddington too presented an evolutionary rationale for England’s entitlement to others’ soil: “England was once as rough and rugged as *America*, and the Inhabitants as blind and barbarous as the Indians.”¹⁵⁸ The rationales of desert, efficiency, and the prevention of waste associated with the labor theory today derive, through Locke, from these arguments that colonists deserved the land by virtue of their industry, which made it more valuable than Native people could. It is important to remember that during the time of their production, these arguments not only inaccurately represented the different groups who were cultivating the lands in question, but also operated alongside an emerging market on which land enclosures acquired monetary value for colonists only upon Native removal from them, actual or projected.¹⁵⁹

As I will show in the next section, these narratives gave cover to the more controversial activities colonists engaged in to expropriate resources and turn them into property. A variety of material factors facilitated the description of this expropriation, for example, as claims to vacant land: many English settled on the grounds of villages where the population had been destroyed by the ravages of new European diseases,¹⁶⁰ or claimed fields temporarily out of use due to Native communities’ crop rotation or preservation of hunting grounds.¹⁶¹ Conflating a variety of circumstances, colonists tendentiously conclude that “Native occupancy did not involve sufficient “labor” to perfect a “property interest”¹⁶²: William Penn called the lands in America “waste or uncultivated

¹⁵⁶ Williams, *supra* note 92, at 211, (citing H.C. Porter, *The Inconstant Savage* 357 (1979)).

¹⁵⁷ John Winthrop, *Generall Considerations for the Plantation in New England* (1629), in JOHN WINTHROP, *WINTHROP PAPERS* Vol. II 120 (Boston: Mass. Historical Soc. 1929-1947).

¹⁵⁸ Banner, *supra* note 7, at 17, note 17 (citing Late 17th c. WILLIAM LODDINGTON, *PLANTATION WORK THE WORK OF THIS GENERATION* 3-4 (London: Benjamin Clark, 1682)).

¹⁵⁹ Preemption rights had monetary value *because of* future projections about removal. See also *infra* Part IIB(ii).

¹⁶⁰ JOSEPH SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 3 (4th ed. 2006); Banner, *supra* note 7, at 29.

¹⁶¹ Tully, *supra* note 132, at 138-39. As Banner notes, “Everyone knew that land could still be owned [in England] even if it was not being farmed, and indeed even if it was not being used or occupied at all.” Banner, *supra* note 7, at 33.

¹⁶² Dukeminier et al., *supra* note 80, at 16.

Country”¹⁶³; Samuel Purchas argued, “if any Countrey be not possessed by other men, every man by Law of Nature and Humanitie hath right of Plantation,” and “[l]awyers in England and throughout Europe agreed that settlers had a legal right to occupy uninhabited land.”¹⁶⁴ In a range of arguments that blurred together or became interchangeable, colonists suggested that Native people were not using the lands, their use was not sufficient to justify their claims, or there were no people on the lands—that the land was *vacuum domicilium*—to make a claim at all.

The alchemy that bound together ideas about the value of land with ideas about the inferiority of Native people was highly significant to the construction of property in the context of conquest. It found its parallel in ideas about Africans that similarly suggested they existed a lower stage of civilizational development or were by nature closer to beasts than humans, which facilitated their enslavement.¹⁶⁵ The connection between ideas about non-whites and property value indexes processes that were crucial to the creation of property and property value together: colonists imagined Native people to be absent as they contemplated removing them to create property in land; ideas that Native and African people were inferior to Europeans developed in conjunction with and justified their dispossession to create property as well. In other words, this process of creating property endowed the most significant commodities on the market with monetary value only when they came into the possession of whites.

2. *The Use of Law to Produce Property in the Colonies*

It is not difficult to see how the colonial narratives described above coalesced to fortify the lodestar ideology that acquisition, in American property law, has concerned “unowned things,” and the corresponding popular, durable mythology of America as *terra nullius*—open, vacant, virgin soil. These fictions of the theory obscure more than the presence, sovereignty, labor, and violence against Native and African peoples. They have also veiled the work that colonists did singularly engage in to produce property in the colonies—enclosing, dispossessing, and occupying Native and African peoples’ lands and bodies.

¹⁶³ JOHN COTTON, *GOD’S PROMISE TO HIS PLANTATIONS* 4 (London, 1634); WILLIAM PENN, *A BRIEF ACCOUNT OF THE PROVINCE OF PENNSYLVANIA* 1 (London, 1686).

¹⁶⁴ *Banner*, *supra* note 7, at 30 note 42 (noting English cases discussing the proposition include *Geary v. Bankroft*, 82 Eng. Rep. 1148 (K.B. 1667), and *Holden v. Smallbrooke*, 124 Eng. Rep. 1030 (C.P. 1668) *See also* 3 THOMAS WOOD, *AN INSTITUTE OF THE LAWS OF ENGLAND* 216 (1724).)

¹⁶⁵ *See, e.g.* WINTHROP D. JORDAN, *THE WHITE MAN’S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES* 14-15 (1974) (describing differences and similarities in English racial perceptions of Africans and Native Americans).

This section describes the specific legal practices and institutions colonists developed to further these endeavors, beginning with the widespread colonial purchase of land from Native nations, which rooted the land market in Native title, and including the survey and recording techniques they developed to organize their interests in these enclosures. Settlers' "tilling" and "planting," too, followed the conditions of land grants that colonial officials used to incentivize emigration. Not least, to build their capacity for occupation, they rendered captive human beings into another major form of property through laws that made the status of enslavement racial, hereditary, and perpetual, and disengaged it from the mission of conversion. Finally, colonists upended the ancient distinction in the English property tradition between real property and chattel property in order to balance the need to keep plantations whole with the demands of creditors. All these developments fostered the colonial market's rapid growth through leveraging debt anchored in property produced through the racialization, lands and people understood as monetary equivalents.

To return to the overarching colonial mission of taking possession of lands, it is crucial to recognize that in every instance, Europeans' ability to do so was challenged by the powerful presence of the existing sovereigns.¹⁶⁶ The English, much to the chagrin of colonial company heads and administrators, understood upon arrival in Plymouth and Jamestown that they had no hope of taking lands by force from the Wampanoag or the Powhatan Confederacy.¹⁶⁷ Thus, notwithstanding English ideological flourishes about *vacuum domicilium*, colonists arrived with instructions to "purchase their tytle, that wee may avoyde the least scruple of intrusion"; in many instances, they formally recognized Native title in Virginia, Massachusetts, and the Carolinas from the earliest days of settlement.¹⁶⁸ Colonists thereby sought permission for their occupation of lands from groups clearly in control of them, and called such payment a matter of "prudence & Christian charity lest otherwise the Indians might have destroyed the first planters."¹⁶⁹ Moreover, the English faced difficulty not paying for these rights when French colonists in the area were doing so; and found few reasons

¹⁶⁶ See generally ALAN GREER, *PROPERTY AND DISPOSSESSION: NATIVES, EMPIRES, AND LAND IN EARLY MODERN NORTH AMERICA* (2017).

¹⁶⁷ See, e.g., Robert Cushman, *Reasons and Considerations Touching the Lawfulness of Removing Out of England into the Parts of America*, in *A RELATION OR JOURNALL OF THE BEGINNING AND PROCEEDINGS OF THE ENGLISH PLANTATION SETLED AT PLIMOTH* (London, 1622); Williams, *supra* note 92, at 206.

¹⁶⁸ See Banner, *supra* note 7, at 24, 39-43 (highlighting that the English respected Indian property rights and continued to do so because their chain of titles originated with purchases from the Indians).

¹⁶⁹ *Councill's Opinions Concerning Coll. Nicholl's Patent and Indian Purchases*, in *IROQUIS INDIANS: A DOCUMENTARY HISTORY OF THE DIPLOMACY OF THE SIX NATIONS AND THEIR LEAGUE* (Francis Jennings et al., eds., 1984).

to object, when they could cheaply obtain occupation rights in this way, and get a foothold for stretching their claims to exclusive title.¹⁷⁰

English colonists thereby recognized Native property rights from the first, in practice, if not always in theory. As Banner points out, “There is no actual difference between respecting others’ property rights and treating them as if one is respecting their property rights. That’s what a property right *is*—the knowledge that one will be treated as a property owner.”¹⁷¹ This practice fit comfortably within the two-stage process of conquest *Johnson* later described: a grant from the Crown was not sufficient to consummate title, but merely authorized colonists to seek actual possession. Colonial officials and private individuals did so by purchasing huge tracts of land from indigenous people, cultivated or not, while proliferating the labor theory,¹⁷² without seeing any contradiction between these justifications. Rather, these ideas appeared as arguments in the alternative, along with the theory of “just war,” as when the Virginia Company described their settlement as legal because “there is roome sufficient in the land... for them, and us... because they have violated the lawe of nations... But chieflie because *Paspehay*, one of their Kings, sold unto us for copper, land to inherit and inhabite.”¹⁷³ In 1707, the New Hampshire Assembly could argue that when they arrived, the lands “were not onely then Vacuum Domicilium but a miserable desert,” but also that the their Ancestors “all along informed and assured us the said Lands were honestly and justly purchased.”¹⁷⁴ The labor theory, purchase, and the theory of just war were compatible as legal arguments safeguarding the end of possession.

The activity of purchase anchored all chains of title in the country in Native title, as *Johnson* later acknowledged. Evidence indicates that the practice of memorializing these payments with recorded deeds did not become established

¹⁷⁰ *Banner*, *supra* note 7, at 39-40 (citing ARCHIBALD KENNEDY, *THE IMPORTANCE OF GAINING AND PRESERVING THE FRIENDSHIP OF INDIANS TO THE BRITISH INTEREST, CONSIDERED* (New York, 1751)).

¹⁷¹ *Id* at 42.

¹⁷² *Id* at 33.

¹⁷³ A TRUE DECLARATION OF THE COLONIE IN VIRGINIA 6 (London: William Barret, 1610). See also *Banner*, *supra* note 7, at 20. Cushman similarly described his right “to go live in the heathens’ country” with multiple counts, including the duty of conversion; “their land is empty... spacious and void”; “They are not industrious; neither have art, science, skill or faculty to use either the land or the commodities of it, but all spoils, rots, and is marred for want of manuring, gathering, ordering, &c.; and “we have it, by common consent, composition, and agreement.” A RELATION OR JOURNAL OF THE BEGINNING AND PROCEEDINGS OF THE ENGLISH PLANTATION SETLED AT PLIMOTH 91-93 (London, Dwight b. Heath ed. 1622), (New York: Corinth Books, 1963). See also JEREMY DUPERTUIS BANGS, *INDIAN DEEDS, LAND TRANSACTIONS IN PLYMOUTH COLONY 1620-1691* 20 (2002).

¹⁷⁴ *Banner*, *supra* note 7, at 22 n.26 (citing DANIEL GOOKIN, *HISTORICAL COLLECTIONS OF THE INDIANS IN NEW ENGLAND* 39 (1674)); immediately turned to inhabited and purchased.

for many decades,¹⁷⁵ due partly to the impermanent nature of settlement at the time, colonists' preference for finding new lands rather than engaging in conflict over specific lands with one another, and because their inexact dealings may have stimulated more rapid settlement.¹⁷⁶ Surveys were haphazard, as a result of colonists following "freedom of location" to choose the most desirable lands, although to a lesser extent in New England than in the South or Middle Atlantic. By the 1660s, as established settlements grew more crowded, land disputes increased due to overlapping grants, claims, and a diminishing ability to simply spread out.¹⁷⁷ Because their records were as haphazard as their surveys, colonists developed the practice of calling one another to testify about purchases that had they had made several decades earlier as proof of title, and recorded retroactive quitclaim deeds based on such testimony.¹⁷⁸ The town of Andover, MA, for example, tried settle disputes over land by appointing townsmen to investigate and record transactions "to be esteemed and accounted as valid and authentick, as if they had been entered and recorded at the time when they were graunted, though the day and year of such graunts be not mentioned nor remembered."¹⁷⁹

Questions about the legitimacy and validity of different colonial charters, as well as colonists' claims vis-à-vis Native groups, lingered through the seventeenth century. The chains of title that colonists constructed from title became increasingly important for them to confirm their own title claims against one another as well as Native groups. When Governor Edmund Andros of the Dominion of New England, for example, sought in 1686 to reverse previously settled policy by invalidating all titles that could not be traced back to government grant, he caused a "storm of protest" from New Englanders, some of whom declared that if purchase from Indians could not serve as the root of a valid land

¹⁷⁵ See e.g., THOMAS HUTCHINSON, *THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY* I 383 (Cambridge, Lawrence Shaw Mayo ed. 1936); David Thomas Konig, *Community Custom and the Common Law: Social Change and the Development of Land Law in Seventeenth Massachusetts*, 18 Am. J. of Legal Hist. 137, 144 (Town Records of Manchester, From the Earliest Grants of Land, 1636... until 1736, 33 (Salem, 1889)). (*Id.* at 137 (1974) (describing how in Essex, MA, "order and regularity were not imposed on land arrangements until after 1660").

¹⁷⁶ See generally, Konig, *supra* note 175, at 140, 146.

¹⁷⁷ *Id.* at 149 ("land is not a limitless resource").

¹⁷⁸ *Id.* at 153, 168 ("It was not unusual in these cases for both parties to bring men to court to attest to usage of the land many decades before, when they had been boys."). See, e.g., EBENEZER W. PEIRCE, *INDIAN HISTORY, BIOGRAPHY AND GENEALOGY, PERTAINING TO THE GOOD SACHEM MASSASOIT OR THE WAMPANOAG TRIBE AND HIS DESCENDANTS* 33-35 (North Abington, MA: Zerviah Gould Mitchel, 1878). Cf. *Jeremy Dupertuis Bangs*, *supra* note 173, at 23-25 (taking issue with Peirce's doubt that early colonists actually obtained these lands by purchase or these later deeds by consent).

¹⁷⁹ Konig, *supra* note 175.

title, “no Man was owner of a Foot of Land in all the Colony.”¹⁸⁰ Each New England coastal town subsequently sought to negotiate retroactive “quitclaim deeds” with “known” descendants of the Native leaders who were contemporaries of the first settlers, to ensure they had extinguished Native title on the record.¹⁸¹ Meanwhile, rectangular surveys grew increasingly common, though colonists were not able to actualize a large-scale, systematic survey across a colony¹⁸²; nonetheless, they devised several such plans, one of the most notable of which emerged from the Carolinas while John Locke was the unofficial secretary for the Lord Proprietors, which recognized that “the whole foundation of the government is settled upon a right and equall distribution of Land, and the orderly taking of it up is of great moment to the welfare of the Province.”¹⁸³

To construct these chains of title, these early title disputes inspired the consolidation of records that is now a hallmark of the Anglo-American property system and that has distinguished it since this time from the English system.¹⁸⁴ The innovation of comprehensive title registration was a technological solution that helped solve the legitimacy questions and need to process and trade land as it became the preeminent colonial commodity in a land market of scale, intensity, and liquidity theretofore unknown in England. As James Willard Hurst, the father of American legal history noted, though many colonies had adopted English practices of protecting estates from easy alienation, such as entail and primogeniture,¹⁸⁵ “the seventeenth-century beginnings of the recording act system expressed our early interest in turning land into a more readily transferable

¹⁸⁰MARY LOU LUSTIG, *THE IMPERIAL EXECUTIVE IN AMERICA: SIR EDMUND ANDROS, 1637-1714* 152-154 (2002); *The Declaration of the Gentlemen, Merchants, and Inhabitants of Boston*, in WILLIAM HENRY WHITMORE, *THE ANDROS TRACTS* (1868).

¹⁸¹ See, e.g., explanation of “second generation deeds” in the Southern Essex District Registry of Deeds. *Narrative: Historical Evidence, Focus Point 2*, SOUTHERN ESSEX REGISTRY OF DEEDS, <https://sailemdeeds.com/NAD/focuspoints2.aspx>.

¹⁸² These practices were evolving in England at the same time as the enclosure movement continued there; by the start of the eighteenth century, Nancy Shoemaker, writes, surveying land for individual ownership, presumably in England as well as in the American colonies, had become respectable and widespread. *Shoemaker, supra* note 109 at 21.

¹⁸³ AMELIA FORD, *COLONIAL PRECEDENTS OF OUR NATIONAL LAND SYSTEM AS IT EXISTED IN 1800* 19-20 (1910). William Penn purchased title to large tracts of land before offering the land to settlers; his first promotional tract promised that lands would be sold free of any “Indian” encumbrance. DONNA BINGHAM MUNGER, *PENNSYLVANIA LAND RECORDS: A HISTORY AND GUIDE FOR RESEARCH* 7 (1991).

¹⁸⁴ In England, “no general deed registration system existed.” *Konig, supra* note 175, at 144.

¹⁸⁵ See also Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 L. HIST. REV. 277 (2015).

good.”¹⁸⁶ Likewise, when the newly formed United States looked to the western lands as its primary asset from a position of bankruptcy, it recognized the need for a record-keeping system and a comprehensive survey in order to quickly absorb lands, after expropriation, into the market it thereby created. Thus, when Congress created a policy for “orderly disposal of the new public domain,” it drew from the New England system of survey before settlement and models of administration utilizing a central land office and registers from Virginia.¹⁸⁷ The meridians that formed the basis of outlines for states and townships in Jefferson’s plan took their cue from colonial charters that followed north-south directions, or parallels of latitude.¹⁸⁸

In short, the fundamental elements of the land system—the comprehensive title registry, and the rectangular survey as a method of creating individual enclosures as well as state and local jurisdictions—grew out of these efforts to take possession of Native nations’ lands. Indeed, Locke’s descriptions of “improving,” “cultivating,” and “enclosing” land are vague and capacious enough to encompass this labor of property production—measuring and mapping land to prepare it for market, as well as consolidating this information to facilitate market transactions. These efforts, as described above, only became necessary as the colonial population burgeoned in the seventeenth and eighteenth centuries in two notable ways and with it, its engrossment of lands. This population, however, did not grow of its own accord. On the one hand, travel to distant, strange lands ruled by powerful nations with the intent to extract and make claims to resources there was a daunting and dangerous venture.¹⁸⁹ The waves of migration that “peopled North America” were engineered by headright, or homesteading land grant laws that left a lasting imprint on the property system, and that for colonial governments and companies, killed several birds with one stone—encouraging immigration to, producing property in, and removing Native people from the lands. On the other, colonists built a labor force to cultivate the lands they thereby expropriated through the importation of captive Africans whom they enslaved, using laws to render this population another major form of property and to racialize slavery in a way that has permanently marked the social order of the nation.

The earliest use of headrights was in Virginia under Sir Thomas Dale’s administration, which promised every man with a family to come to the colony

¹⁸⁶ JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 12 (1956).

¹⁸⁷ MALCOLM J. ROHRBOUGH, *THE LAND OFFICE BUSINESS: THE SETTLEMENT AND ADMINISTRATION OF AMERICAN PUBLIC LANDS, 1789-1837* 7 (1968). *See generally* Ford, *supra* n. 187 (in the early surveys of the New England town commons and of the river lands everywhere, is found the germ of the modern rectangular system.”).

¹⁸⁸ Ford, *supra* note 183, at 10.

¹⁸⁹ Park, *supra* note 21, at 81; BERNARD BAILYN, *PEOPLING OF BRITISH NORTH AMERICA* 81 (1986).

twelve acres and a house in 1614. Colonies across the eastern seaboard found it virtually impossible to recruit populations for their settlements until they adopted some variation of the headright system.¹⁹⁰ The headright laws placed conditions on land grants that included agricultural activity—Locke’s “tilling” and “planting.”¹⁹¹ To “consummate” their title, in parallel logic to the two-step discovery rule, settlers had to clear, cultivate, occupy, and defend a certain amount of land over a term of years. In Virginia, for example, a settler had to build a house, plant one acre, and keep stock for one year, within three years, or risking forfeiting the land; in Massachusetts, settlers had to “take actual possession” and build a house of certain size and clear five to eight acres fit for “mowing and tilling.”¹⁹²

The headright laws worked to accomplish the goal of removal in several ways. First, actual occupation, guided by the requirements of land grants and ordered by government had the effects, as Eric Kades and others have observed, of spreading disease and chasing away game. The ways that settlement made life more difficult for Native people, in turn, made it easier for private individuals and governments to purchase land from them: “A native population decimated by sickness and deprived of sources of food and other necessities had little bargaining power. The title of occupancy went for a pittance.”¹⁹³ Further, colonies made larger land grants to men “able to defend it, and in this way to secure protection without the expense of a standing army.” Men who brought military-aged men ready for combat and who served in wars against Native nations received especially large grants.¹⁹⁴ Even before the Revolutionary War had ended, at least three states adopted headright systems to help populate their “back country”—Virginia, North Carolina, and Massachusetts, which offered settlers 100 acres on the sole condition of clearing sixteen acres in four years.”¹⁹⁵ Like the basic elements of the land system, the United States adopted the strategy of incentivizing settlement with promises of land as well, though at a price, to help it extinguish Native title in western territories.¹⁹⁶ The legislation

¹⁹⁰ Ford, *supra* note 183, at 96-98.

¹⁹¹ In the early period, settlement was the end desired, and to further this, lands were freely bestowed.” *Id.* at 95.

¹⁹² *Id.* at 103.

¹⁹³ Eric Kades, *The Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000).

¹⁹⁴ Ford, *supra* note 183, at 103, 104.

¹⁹⁵ *Id.* at 102.

¹⁹⁶ Rohrbough, *supra* note 187, at 4.

Congress passed to achieve these ends includes the famous Homestead Act of 1862, as well as a string of predecessor and progeny legislation.¹⁹⁷

All of the colonies developed some dependence on enslaved Africans to labor on the lands they so rapidly sought to expropriate, although nowhere so great as in the South. About 600,000 of the 12 million Africans taken into captivity for the transatlantic slave trade were brought to mainland America. The laws colonies passed with respect to this labor force created a new, emphatically racial form of property in perpetually enslaved humans that disengaged the condition of enslavement from the Christian mission of discovery. Notwithstanding references to the origin of the slave trade in theories of Christian just war, Virginia passed a law providing that baptism could not affect the bondage of Black or Native people in 1667, ensuring that “the skin color and not the heathenism of their black and Indian slaves... ‘justified’ their subjugation.”¹⁹⁸

Other laws ensured the racial, hereditary, and perpetual nature of enslavement in America by tying it to kinship and segregation in ways that, as Jennifer Morgan has written, “legally completed” the association between blackness and forced labor.¹⁹⁹ Colonies dictated that free-born women who married an enslaved person would also be enslaved during their husbands’ lifetime, and that the children born within such marriages would be slaves for life. In 1662, Virginia passed a law stating that “all children borne in this country shalbe held bond or free only according to the condition of the mother,”²⁰⁰ contravening the English common-law rule that status followed the condition of the father. This rule of *Partus sequitur ventrem*—literally, “off-spring follows the womb”—became a governing principle of property across the colonies, and ascended to paramount importance in the U.S. domestic slave trade after the importation of enslaved Africans was abolished in 1808 and the rape of Black women became a key means of property increase. The Virginia judge James Gholson, speaking to the state legislature in 1831, saw the rule as crucial enough to claim that “‘Partus sequitur ventrem’ is coeval with the existence of the right of property

¹⁹⁷ Homestead Act of 1862, ch. 75, § 4, 12 Stat. 392; General Preemption Act of Sept. 4, 1841, ch. 16, § 10, 5 Stat. 453, 455-56.

¹⁹⁸ *Higginbotham*, *supra* note 141, at 36-37.

¹⁹⁹ JENNIFER L. MORGAN, *LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY* 72 (2004). *See also* *Higginbotham*, *supra* note 141, at 40-47; *Jordan*, *supra* note 165, at 44-45. These conditions did not evolve immediately or consistently with the importation of Africans to the mainland. *See* LINDA M. HEYWOOD AND JOHN K. THORNTON, *CENTRAL AFRICANS, ATLANTIC CREOLES, AND THE FOUNDATION OF THE AMERICAS, 1585-1660* 323-27 (2007).

²⁰⁰ 2 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619. : PUBLISHED PURSUANT TO AN ACT OF THE GENERAL ASSEMBLY OF VIRGINIA, PASSED ON THE FIFTH DAY OF FEBRUARY ONE THOUSAND EIGHT HUNDRED AND EIGHT. 170 (New York: Printed for the editor, by R. & W. & G. Bartow., William Henning ed., 1823).

itself.”²⁰¹ The “equation of black skin with the potential for enslavement,” Barbara Holden-Smith observes, also meant that before abolition, “free blacks in both the North and the South lived under constant threat of being kidnapped and sold into slavery.”²⁰²

The racial hierarchy of discovery that underpinned the colonial enterprise as a whole acquired its strongest elaboration through the development of this institution-- its laws, its practices, and the lived experiences and relationships that it spawned. That is, the specific ideological content of that racial hierarchy was not prescribed by the Discovery Doctrine—it evolved through enslavement, as well as through the labor theory, as we have already seen, and also colonists’ practices on the ground, of transacting with non-white groups very differently than with one another.²⁰³ These forms of legal debasement, key to the construction of Black laborers as *property* in contradistinction to white servants, helped evolve an anti-blackness that affected free as well as enslaved Black people, and also influenced evolving colonial racial ideas about Native people.²⁰⁴ Non-whites were increasingly grouped together in colonial racial legal codes that limited the mobility of non-whites, along with their freedom of assembly, freedom to bear arms, and capacities in court, among other things.²⁰⁵

An evolving set of debates about how to treat property in enslaved people and expropriated lands also helped to transform and liquify the already unprecedentedly commodified colonial land market, undermining an ancient distinction between real and chattel property in English property law in the process. For centuries, English property law regarded land and moveable goods as essentially unlike, due to land’s unique characteristics of sustaining life, and the challenges of designating its features, such as rivers, lakes, forests, and shorelines, as the private property of an individual rather than as a common good. Under that ancient distinction, chattel property, but not real property, was liable to seizure for the nonpayment of debts.²⁰⁶ However, the protection of large estates

²⁰¹ DAINA RAMEY BERRY, *THE PRICE FOR THEIR POUND OF FLESH: THE VALUE OF THE ENSLAVED, FROM WOMB TO GRAVE, IN THE BUILDING OF A NATION* 11 (2017).

²⁰² Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086, 1087 (1993).

²⁰³ See *Park*, *supra* note 109.

²⁰⁴ Nancy Shoemaker observes, English stereotypes about Native people’s inferiority did not congeal in emphatically racial terms until the eighteenth century. See generally, *Shoemaker*, *supra* note 109. I argue that racially differentiated legal practices preceded this ideological formation, suggesting that racial practices can contribute to the dynamic process of racial ideological formation. *Park*, *supra* note 109.

²⁰⁵ *Higginbotham*, *supra* note 141, at 39-41, 76-82.

²⁰⁶ WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 201 (1766); Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 HARV. L. REV. 385 (2006); K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 L. & SOC. INQUIRY 1006, 1007-1008 (2016).

from foreclosure made it possible for debtors to conceal enslaved persons from their creditors on their land. Further, the value of land and the labor of enslaved people were interdependent in the colonies, since each of these assets became useless for the enterprise without the other.

The attempt to keep plantations whole led to debates about the proper legal category for enslaved Black people and experiments in treating them both as chattel-- the legal equivalent of cattle, sheep, and horses-- and distinguishing them from that category by treating them as real estate instead. Because property in enslaved people was so valuable and constituted such a huge part of people's assets,²⁰⁷ several colonies used the real property designation to protect property in people from the rules governing chattel property. South Carolina, for example, tried to characterize slaves as real estate in 1690, following Barbados, but the English Privy Council would not permit it; Virginia, Louisiana, Kentucky and Arkansas all designated enslaved persons as realty between 1705 and 1852. As Thomas Morris notes, "rules of real property law were applied to slaves in some instances in over one-third of the jurisdictions that made up the slave South."²⁰⁸ As the Virginia jurist St. George Tucker of Virginia stated, the incidents to real and personal property, respectively, are merely creatures of the *ius positive*, or ordinary rules of law concerning them; and may be altered and changed to suit the circumstances, convenience, interest, and advantages of society... Thus in England it might be for the benefit of commerce to consider a lease for a thousand years, in lands, as a mere chattel; and in Virginia it might have been equally for the advantage of agriculture to consider the slave who cultivated the land as real estate.²⁰⁹

While these experiments underscore the malleability and function of legal categories, applying the protections of real estate to enslaved people highly frustrated planters' creditors, who lobbied for the opposite conflation—to make lands, as well as enslaved persons, liable for unsecured debts in the colonies. At creditors' behest, colonies, beginning in the northeast, began to adopt laws abandoning the ancient protections of lands from foreclosure,²¹⁰ likely encouraged by the fact that colonists had already normalized easy foreclosure in transactions with Native people for land for decades.²¹¹ Finally, after lobbying from the biggest independent slave traders in England, Parliament made lands, as

²⁰⁷ Jones, *supra* note 1, at 95-98.

²⁰⁸ THOMAS MORRIS, SOUTHERN SLAVERY AND THE LAW 1619-1860 64 (1996).

²⁰⁹ *Id.* at 65.

²¹⁰ Priest, *supra* note 206.

²¹¹ Park, *supra* note 206.

well as enslaved persons, liable for nonpayment of debts across the British colonies with the Debt Recovery Act in 1732.²¹² Following the passage of this Act, transfers of land accelerated, slave auctions became more frequent, and access to credit flooded the colonial market. In other words, during the colonial period, property laws transformed to make it easier to seize both land and enslaved people like chattel for unpaid debts in unprecedented ways.

This breakdown of the ancient distinction between real and chattel property during the colonial period-- with the development of the comprehensive survey and title registry, and in the context of the collective effort to exclude Native and African claims to their lands and bodies-- ushered in novel understandings of property that are so naturalized today that they largely escape scrutiny. The principle of "discovery," and the conception of "unlimited" land there for the taking did not guide the creation of the land system in England; the enclosure of common fields was a relatively new development there at the time; England is only undertaking the compilation of a comprehensive land registry now and the project remains incomplete; and though mortgages were common, failure to pay debts resulted in divisions of interests that no longer exist in the same way, such as the owner's loss of usufructual rights, or the right of a lender to take possession of a property and harvest the fruits and rents of land.²¹³

These elements made a measure of land to clearly define the enclosure as a commodity; centralizing and publicizing information concerning that commodity facilitated its trade. While the ideas of boundaries themselves were not new,²¹⁴ enclosures evolved in America to serve the novel idea that "individuals possess *all* the resources within a given area of land."²¹⁵ Above all, the mortgage converted that commodity into an access point for a stream of credit to build the colonial economy, while making the power to expel people from the land, to seize homes to satisfy debts, a key mechanism of that credit system, without which credit and the growth it fed would grind to a halt.

In other words, this new system evolved to quickly process resources for their potential to yield monetary profits and open credit streams, not to preserve homelands, nor create a society that prioritized stability in the conditions that support life. It was successful in its goals, and relentless in exploiting the resources it took to be expendable—people's basic needs. Its effectiveness at converting the resources extracted by conquest into monetary value generated an unprecedented and voracious market, encouraging colonial and state governments, and finally the United States, bankrupt after the Revolutionary War, to

²¹² Priest, *supra* note 206.

²¹³ Ann Burkhart, *Lenders and Land*, 64 MO. L. REV. 251-253 (1999).

²¹⁴ Banner, *supra* note 7, at 43-44 (quoting Roger Williams: "The *Natives* are very exact and punctuall in the bounds of their Lands. And I have knowne them make bargain and sale amongst themselves for a small piece, or quantity of ground.").

²¹⁵ *Id* at 37.

view the sale of “wild lands” as their greatest source of revenue.²¹⁶ Perhaps it is self-evident that the production and regulation of the most reliably valuable assets on this market-- lands and people—would become a major priority, preoccupation, and source of conflict for colonial and state governments and the United States, in ways that had a lasting effect on law and legal institutions, not to mention the nation’s political, social and economic life. Many changes and trends built on those that I have described from the colonial era: by 1846, several advocates at the NY Constitutional Convention comfortably argued that “there should be no more restrictions placed upon alienation of real estate than upon personal estate. Property was improved by passing from hand to hand...”²¹⁷ Hurst describes how in the nineteenth century, “we began to remove such feudal restrictions on alienation as we had suffered and to build up the intricate body of law concerning the recording acts and the title problems involved in the finance of land trading.”²¹⁸ While discussing “the enthusiastic nineteenth century expansion of contract,” he further proclaimed that “[t]he first and most dramatic victory of contract was its capture of the land,” adding, in an echo of the labor theory, that “the sheer abundance of land was probably enough to assure that a static, feudal type of tenure could not take lasting root with us.”²¹⁹

C. Possession by Dispossession

The theory of “possession” focuses a question that has underpinned the entire foregoing analysis and also a central question of modern law: the way the law organizes the state’s monopoly on force. The well-known maxim that “possession is nine-tenths of the law” addresses this relationship by acknowledging that it requires an undesirable degree of force to take possession away from someone and grant it to someone else; the ancient Roman law of *uti possidetis* (“as you possess, you may continue to possess”) too expresses a strong preference for stability. In U.S. law, however, taking “possession” was the consummating condition for claiming title by conquest. Efforts to take possession of the continent in this context flip the ancient priority of maintaining the status quo on its head.²²⁰ As Hurst observed, in the United States, “We did not devote

²¹⁶ See Ford, *supra* note 183; ANDRO LINKLATER, MEASURING AMERICA: HOW AN UNTAMED WILDERNESS SHAPED THE UNITED STATES AND FULFILLED THE PROMISE OF DEMOCRACY (2002).

²¹⁷ DEBATES AND PROCEEDINGS IN THE NEW-YORK STATE CONVENTION FOR THE REVISION OF THE CONSTITUTION (Albany, S. Croswell and R. Sutton, eds., 1846). See also Hurst, *supra* note 186, at 13.

²¹⁸ Hurst, *supra* note 186, at 13.

²¹⁹ *Id.* at 12.

²²⁰ This inversion of ancient principles is consistent with the laws and institutions described above in IIB(ii), which Hurst observed “made private property a dynamic, not a static institution.” *Id.* at 9-10.

the prime energies of our legal growth to protecting those who sought the law's shelter simply for what they had"; "our enthusiasm ran rather to those who wanted the law's help positively to bring things about."²²¹ Aziz Rana has called the identity of the projects of conquest and nation-building "the two faces of American freedom."²²² Similarly, Richard Hildreth took stock of the oppositely charged ways that Americans understood their country in 1840, when, reflecting on chattel slavery, he called the American Republic an experiment in racial despotism as much as in democracy.²²³

This article suggests that the glue between the two faces of American freedom is the legal practices and institutions that Anglo-americans created—to both extract resources from prior possessors and reconstitute them as property, for example. The principle of possession in U.S. law selectively applied the law to recognize whites' possession, but not Native or Black people's. Beyond this inequity, however, the centuries-long, concerted effort to take possession of the continent and dispossess others had a significant impact on the development of the laws and institutions that facilitated that process. To accomplish these goals, the laws mobilized, guided, and sanctioned force to a degree neither known or necessary in contexts where the aim of governance was to maintain the status quo. This section illustrates the specific ways that laws organized force for the twin processes of dispossession and taking possession by first, returning to the example of headrights or land grants, and second, turning to the enslaved persons' flights to freedom and the "fugitive slave" controversy. As I show, the state had no capacity to take direct responsibility for the force required to create and maintain the two principal genres of property in early America—land and human beings-- resulting in innovative structures of governance. With promises to back private claims to ownership and wealth, the state guided a diffusion of force that came to permeate and animate private life, as well as governance. This approach to building a nation and its markets generated lasting norms about the role of law and violence in society, evidenced in legal disputes that pitted one community's ancestral homelands against another's real estate market, and human freedom against a fearfully powerful new right to property in the United States.

1. The Headright or Homesteading Principle: Conquest by Settlement

As with other elements of the property system, the United States adopted the colonial method of incentivizing settlement with headrights or land grants to take possession of western territories. This approach accomplished the goals it served in the colonies-- recruiting population to occupy lands, removing Native people from those lands, and converting those lands into property—and also,

²²¹ *Id.* at 10.

²²² AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010).

²²³ MANISHA SINHA, *THE SLAVE'S CAUSE: A HISTORY OF ABOLITION* 14 (2016).

creating revenue for the federal government, which was \$54 million in debt at the end of the Revolutionary War.²²⁴ Though the western lands were still ruled by powerful Native nations, early statesmen anticipated that “a rich and fertile country, of an area equal to the inhabited extent of the United States, will soon become national stock.” Further, they understood that because the process of taking possession of this territory would involve violence, that “Indian hostilities... would always be at hand.”²²⁵ The legal approach the government took to conquest, as in the colonies, outsourced a large degree of this violence to private parties, especially squatters.²²⁶ For the next century, settlers consequently moved into Indian Country, often ahead of the survey, to take possession of lands against Native nations’ claims, believing that the federal government had authorized them in activity they knew, by the same token, to be “extra-legal.”²²⁷ As Hurst wrote, “we loaned the organized force of the community to private planners,”²²⁸ ensuring “the central place of the modern institution of private property in our politics as well as in our economic organization,”²²⁹ and that “the challenge of the unopened continent dominated our imagination.”²³⁰

After the Revolutionary War, the United States claimed vast territories ceded by Britain under the Treaty of Paris, but exerted no actual control over the region. “[T]he impoverished, ill-armed United States did not have the means to carry out the policy of force that it had adopted”²³¹ to remove Native people from their homelands; and when the Continental Congress considered how to pay soldiers and generate revenue from the lands it sought to claim in 1783, it admitted that “the public finances do not admit of any considerable expenditure to extinguish Indian claims upon such lands.”²³² Secretary of War

²²⁴ See e.g. Reginald Horsman, *The Indian Policy of an Empire for Liberty*, in NATIVE AMERICANS AND THE EARLY REPUBLIC 38 (Frederick E. Hoxie et al. ed., 1999); see also DAVID ANDREW NICHOLS, RED GENTLEMEN AND WHITE SAVAGES 88 (2008). K-Sue Park, *Insuring Conquest: U.S. Expansion and the Indian Depredation Claims System, 1796-1920*, 8 HIST. PRESENT 57, 65 (2018).

²²⁵ THE FEDERALIST NO. 25, at 165 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²²⁶ Park, *supra* note 224, at 59.

²²⁷ BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES (1924).

²²⁸ Hurst called this the “release of energy” approach.” Hurst, *supra* note 186, at 10-11.

²²⁹ *Id.* at 2.

²³⁰ *Id.* at 8.

²³¹ REGINALD HORSMAN, RACE AND MANIFEST DESTINY 38 (1999). Secretary of War Henry Knox calculated that it would require 2500 to 3000 men each year, and at least \$2 million over two years, without accounting for losses in lives, property and abandonment of the frontiers. By contrast, a policy of managing Indian relations would be only \$15,000/year for fifty years. Banner, *supra* note 7, at 130-131.

²³² JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, 25: 682-83; see also Hibbard, *supra* note 227, at 32-33; Park, *supra* note 224, at 65.

Henry Knox, following a view expressed by none other than George Washington, among others, recommended that the nation adopt the tried and tested method of settlement, rather than a military campaign; referencing the ways settlers had spread disease and chased away game to effect Native removal, Knox advised that “it is most probable that the Indians will, by the invariable operation of the causes which have hitherto existed in their intercourse with the whites, be reduced to a very small number.”²³³ Though the federal government disbursed land grants to Revolutionary War soldiers, and continued to make land grants for military services in the borderlands during the period of the early Republic,²³⁴ unlike colonies, it planned to sell the lands to settlers and thereby make the territories a source of national revenue to deal with its extensive debts. As Ablavsky writes, “These western lands became the new nation’s arguably most valuable asset: cheap now, they promised to rise inexorably in value as Anglo-Americans migrated west.”²³⁵

The Trade and Intercourse Acts, a series of legislation passed in 1790, 1793, 1796, 1799, 1802, and 1836, made the federal government the only entity that could acquire Native nations’ lands—as we saw above, by purchase or conquest—and it became the middle point for transfer from Native nations and distribution to private entities. In order to manage this role, the government established a federal land system, including a U.S. Surveyor General’s Office and Land Offices to receive and affirm settlers’ claims. The federal government’s prerogative to acquire lands meant that prospective private purchasers-- settlers, squatters and speculators alike-- had to wait to formally buy land. In practice, they did not wait for this formality to enter onto tribal lands: as Andro Linklater writes, “[t]he race that developed between surveyors and squatters marked the entire history of the land survey, and it was rare for a surveying team to measure productive country that had no settlers at all.”²³⁶

Settlers’ first efforts to take actual possession of lands, as Knox and others foresaw, made life less tenable for Native nations and facilitated the federal government’s ability to negotiate with them for a cheap price. While in difficult diplomatic situations, the government punished settlers for their incursions, in many other instances, they turned a blind eye and confirmed settlers’ claims. As a result, just as the colonies relied on settlers to “form a rough, ready, and cheap

²³³ FRANCES PAUL PRUCHA, *DOCUMENTS OF UNITED STATES INDIAN POLICY*, 12 (3rd ed., 2000) (Report of Henry Knox on the Northwestern Indians (June 15, 1789)).

²³⁴ E.g. land grants at Vincennes. An Act for granting lands to the Inhabitants and settlers at Vincennes and the Illinois country, in the territory northwest of the Ohio, and for confirming them in their possessions (Act granting lands to settlers at Vincennes), 3 U.S. Statutes at Large 27 (Mar. 3, 1791): 221–222 (giving 400 acres to persons who in 1783 were “heads of families at Vincennes or in the Illinois county”); *see also Nichols, supra* note 232, at 87–8; *Park, supra* note 224, at 66.

²³⁵ *Ablavsky, supra* note 88, at 14.

²³⁶ *Linklater, supra* note 216, at 163.

border militia,” settlers provided the front-line for the United States’ territorial expansion.²³⁷ Understanding their own position, they spread into Indian Country aggressively to pressure the federal government into purchasing the lands.²³⁸ Banner notes that “[s]ettlers on the frontier knew very well that initiating conflict with the Indians was the surest way to prod the federal government to buy the Indians’ land”; an emissary to the federal government complained that in the Georgia borderlands, settlers’ rallying cry had become “let us kill the Indians, bring on a war, and we shall get land.”²³⁹

Many government officials described the consequent violence in the borderlands as the result of troublesome “banditti” and “rabble” on both sides.²⁴⁰ This characterization does not acknowledge the extent to which the federal government encouraged, tolerated or acquiesced in, and benefited from settlers’ activities. By 1785, it had already become conventional wisdom that the federal government should purchase land “as fast as Americans could settle on” it, with the rationale of preventing war, causing Secretary of State Timothy Pickering to point out that this logic of expansion had no limit, and to ask pointedly, “where shall we stop?”²⁴¹ However, under this arrangement, the government not only preserved federal dollars by not paying a formal military force to take the lands, but also maintained a position of formal diplomacy towards tribes.²⁴² The apparent independence of settlers’ violence left the government free to pursue an overt policy of conciliation for most of the nineteenth century.²⁴³

For their part, settlers understood themselves as acting at the behest of the federal government. In 1836, the Pike River Claimants Union, comprised of settlers who knowingly settled outside the bounds of formally acquired territory, adopted a constitution for themselves, in which they explicitly expressed their understanding and belief that they had done so in keeping with government’s wishes: “as the Government has heretofore encouraged emigration by granting pre-emption to actual settlers, we are assured that our settling and cultivating the public lands is in accordance with the best wishes of Government.” Stressing their sacrifices and labor, they “solemnly pledged” to protect each others’ “just rights.” Hurst opened his most famous book with this statement to protest the depiction of “lawless” settlers as “too glib a characterization.” Hurst

²³⁷ *Rohrbough, supra* note 187, at 4.

²³⁸ *Banner, supra* note 7, at 124-125.

²³⁹ THE LIFE AND CORRESPONDANCE OF RUFUS KING, 1: 106-7 (Charles King ed., 1895-1900); LETTERS OF BENJAMIN HAWKINS, 1796-1806 102 (Savannah, 1916).

²⁴⁰ Gerald Clarfield, *Protecting the Frontiers: Defense Policy and the Tariff Question in the First Washington Administration*, 32.3 WM. & MARY Q. 443-64, 445, 449-50 (1975).

²⁴¹ *Banner, supra* note 7, at 125.

²⁴² *Park, supra* note 224, at 68.

²⁴³ *Id.* at 67.

emphasized settlers' embrace of and demand for legal order: for him, the convictions of claimants unions reflected "working principles by which we organized the relations of legal order and social order in the nineteenth century United States," which he called "the release-of-energy policy."²⁴⁴ Indeed, in keeping with the "two faces" model, settlers did understand themselves as bringing law to the territory-- as "resident militia," who "served in the field without compensation and at their own expense,"²⁴⁵ and the frontline of a new jurisdiction on its way.

For decades, the federal government evaded settlers' claims that it had encouraged and incentivized their encroachment into others' lands.²⁴⁶ However, at the end of the nineteenth century, with the territories largely under their actual control, it began to explicitly celebrate their actions in ways that have become a part of the national mythology. In 1886, for example, the House Committee on Indian Affairs declared that

The early pioneers in the far West, the makers of a new civilization, the founders of a great empire, the leaders in the great army of workers who have made the vast western wilderness blossom with rich harvests, are among the noblest heroes and greatest benefactors of this Republic, and deserve from a grateful country an ample recognition of their trials and privations. It is difficult for one who has not taken part in that stupendous work to realize the labor of these early pioneers.²⁴⁷

The context of this statement, ironically, was one in which the federal government closed the door on many of those settlers' formal claims for compensation for the losses they incurred on the frontier. For decades, they had pursued these claims precisely by arguing that they had served at the government's behest. The structure of private incentives that the government deployed, however, created enough space between settlers' formal petitions for indemnity and the government's public declarations that the latter could alternately disavow, tacitly endorse, or openly praise the racial violence of conquest. These mixed sentiments swirled around a legal structure that, in *not* conforming to traditions of occupation by direct command, made a satisfying answer impossible to the question of whether the government bore responsibility for the racial rage that fueled occupation and conquest, or whether it did not.

²⁴⁴ *Hurst, supra* note 186, at 4, 6, 9.

²⁴⁵ In 1897, for example, the state of Utah sent a memorial to Congress calling their settlers "resident militia" who "served in the field without compensation and at their own expense, and have never been reimbursed therefore [sic]." *Park, supra* note 224, at 68.

²⁴⁶ "Claims" in the sense of its broad public characterization of settlers' activities, but also in the specific sense of claims for indemnity owed to settlers under a program known as the Indian Depredation Claims System. For a more detailed analysis of this early system of social insurance, *see id.* at 224.

²⁴⁷ *Id.* at 78.

Settlers' labor was multivalent—it consisted of nation-building, property creation, and the racial violence of Native removal. Settlers driven by the promise that the government would validate their private property claims helped bring new jurisdictions into existence. The force they deployed to take lands from Native nations, who fiercely resisted their encroachment, made the frontier a great space of racial violence. Because of the government's legal approach to conquest, however, this violence did not have the character of a formal military occupation. Instead, it manifested as *private* racial violence, steeped in all the prejudices and affects of interpersonal relationships. The strategy of conquest cultivated, among other things, an aggrieved population of settlers who, often feeling abandoned and left without protection by the state, nevertheless found their identity in their alignment with it and the racial war they believed it directed, and vented their rage upon those in possession of the lands in which they believed their future worth lay.

2. *Property Against the Self-Possession of Human-Beings*

The great contradiction of the American chattel slave trade—the fact that a person remained a person, though treated by law as property—generated an entire infrastructure of law that sharply focuses the questions of possession and the relationship between the law and force. The effort to elevate the property value above the human value of an enslaved person manifested in a wide variety of laws that sanctioned slaveholders and other whites' violence against and sexual abuse of that individual. In general, under laws regulating slavery, slaveholders had “the unlimited right to abuse their slaves to any extreme of brutality and wantonness as long as the slave survived,”²⁴⁸ and third parties had battery rights with limitations.²⁴⁹ In the case of death, while colonial laws generally that such killings were not punishable as murder,²⁵⁰ U.S. states recognized them as homicide unless they occurred in the commission of the highly malleable exception called a “moderate correction.”²⁵¹ In *State v. Mann*, Judge Ruffin called “full dominion of the owner over the slave... essential to the value of slaves as

²⁴⁸ Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619-1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93 (1985); see also Morris, *supra* note 208, at 163-71.

²⁴⁹ Morris, *supra* note 208, at 196-97.

²⁵⁰ E.g. VA 1669, An Act about the casuall killings of slaves. WILLIAM WALLER HENING, *THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619*, 270 (New-York 1823); see also Morris, *supra* note 208, at 163-71.

²⁵¹ Morris, *supra* note 208, at 171-81.

property, to the security of the master, and the public tranquility, greatly dependent upon their subordination.”²⁵²

In short, Anglo-americans laws sanctioned and directed enormous violence toward the effort to control people as property. This section examines the specific controversy over enslaved people’s flight from captivity as perhaps the clearest illustration of this violence and the extent to which a person, despite all efforts to deny it, remained in possession of herself. For that reason, from the beginning, people’s determination to escape bondage profoundly destabilized the institution of slavery itself.²⁵³ The central issue of fugitivity was possession on both sides: people’s self-reclamation subverted slaveholders’ “uncontrolled authority over the body”—their possession.²⁵⁴ Slavery pitted people’s self possession against slave owners’ possession of them, that is, so that one person’s liberty confronted another’s property right. As Peter Wood wrote, “[n]o single act of self-assertion was more significant among slaves or more disconcerting among whites than that of running away... these were the people who, in a real sense, elected to ‘steal themselves.’”²⁵⁵ The effort to defy the persistent fact of personhood produced shows of force that no matter how constant and overwhelming, proved inadequate to an impossible task, frustrating both slaveholders and the very institution of slavery.

There was no period of the slave trade that slaveholders did not use law to organize the force of the state to protect their rights to property in people against fugitivity. As C.W.A. David wrote in 1924, “Almost immediately after the introduction of slavery we find that its horrors led to so many runaways that colonial laws relating to fugitive slaves had to be enacted”²⁵⁶; various laws commanded private persons to capture any enslaved person they found traveling without a pass.²⁵⁷ Perhaps because of this common law heritage, the Fugitive Slave Clause of the Constitution was adopted without event.²⁵⁸ However, by the time of the Constitutional Convention, the sectional divide between the

²⁵² *State v. Mann*, 23 N.C. 263 (1829); for commentary, see EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 35-36 (1976); MARK TUSHNET, SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE (2003).

²⁵³ As Eugene Genovese has observed, people’s escapes— “struck the hardest blow.” *Genovese*, *supra* note 252, at 648.

²⁵⁴ *Id.* at 635.

²⁵⁵ PETER H. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION 239 (1974).

²⁵⁶ C.W.A. David, *The Fugitive Slave Law of 1793 and its Antecedents*, 9 J. NEGRO HIST. 18, 18 (1924).

²⁵⁷ *Id.* at 19. See also MARION GLEASON McDougall, FUGITIVE SLAVES 1619-1865 2, 89 (1971); and Holden-Smith, *supra* note 202, at 1116.

²⁵⁸ Jeffrey M. Schmitt, *The Federal Right to Recover Fugitive Slaves: An Absolute but Self-Defeating Property Right*, 2 SAVANNAH L. REV. 21, 22 (2015).

states on the issue of slavery was clear.²⁵⁹ Vermont, Massachusetts, Pennsylvania, and New Hampshire all abolished slavery between 1777 and 1784.²⁶⁰ Further, the stakes of the trade had grown: by 1774, the value of property in human beings held across the colonies was over £21 million,²⁶¹ the equivalent of almost \$3.2 billion today. During the Revolutionary era, the number of people who escaped and sued their enslavers for freedom increased dramatically²⁶²; groups of enslaved people in New England organized antislavery committees and disseminated Black freedom petitions with the help of white abolitionists.²⁶³ One runaway ad placed in Virginia in 1773 complains that the imagination of freedom “a Notion now too prevalent among the Negroes, greatly to the Vexation and Prejudice of their Masters.”²⁶⁴

In response to a controversy arising from the abduction of John Davis from Pennsylvania to Virginia, Congress passed the Fugitive Slave Law of 1793, which authorized a slaveholder or “his agent or attorney” to “seize the fugitive” and seek a certificate for removal from a judge or magistrate.²⁶⁵ Because the 1793 Act provided no penalties for false claims, slave catchers found it simple to procure removal certificates for free as well as escaped Black people. As Barbara Holden-Smith comments, the Act “proved to be an inadequate solution to the conflict over the return of fugitive slaves, and it did nothing to deal with the problem of the kidnapping of free blacks.” Kidnappings in the North subsequently increased, perhaps also fueled by new pressures from the prohibition on the transatlantic trade in 1807 and the establishment of new cotton plantations in the Old Southwest.²⁶⁶ The free states became “one vast hunting ground” as

²⁵⁹ See James Madison: “The States were into different interests not by their difference of size, but... principally from [the effects of] their having or not having slaves.” 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 486 (Max Farrand ed., Yale Univ. Press 1911).

²⁶⁰ *David*, *supra* note 256, at 20.

²⁶¹ *Jones*, *supra* note 1, at 90.

²⁶² *Sinha*, *supra* note 223, at 67.

²⁶³ *Id.* at 42.

²⁶⁴ Ad placed by John Austin Finnie, National Humanities Center, available at <http://nationalhumanitiescenter.org/pds/maai/enslavement/text8/text8read.htm>.

²⁶⁵ See Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J. SOUTHERN. HIST. ASS'N 397; see also, THOMAS MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780-1861*, 19-22 (1974).

²⁶⁶ *Holden-Smith*, *supra* note 202, at 1119-20; see also GARY B. NASH & JEAN SODERLUND, *FREEDOM BY DEGREES: EMANCIPATION IN PENNSYLVANIA AND ITS AFTERMATH 197* (1991).

slave catchers roamed them “to reclaim runaway slaves but also to kidnap free blacks to sell into bondage in the South,” using both force and trickery.²⁶⁷

In response, many free state governments passed “Personal Liberty Laws” to supplement the Act with both protections for Black people against kidnapping and state assistance for slave catchers who complied with the state’s procedures.²⁶⁸ Pennsylvania, a free state bordered by three slave states tried repeatedly to address kidnapping.²⁶⁹ In 1826, it required Southern claimants to apply to a judge, justice of the peace, or alderman for an arrest warrant, and to produce evidence other than their own affidavits to verify claims; several other northern states followed with more and less protective provisions.²⁷⁰ In the circumstances that led to *Prigg v. Pennsylvania*, Margaret Morgan, who had lived with her parents in practical, if not formal freedom for her entire life, eventually married a free man from Pennsylvania, where she then moved with him and their children and had at least one more child. After her formal slaveholder died, his niece and heiress hired “four prominent Maryland citizens,” including Edward Prigg, to seize Mrs. Morgan. Since the justice of the peace from whom they sought a certificate of removal “refused to take further cognizance of the case,” they forcibly took her and all her children back to Maryland and into slavery, in violation of Pennsylvania law.²⁷¹ When the dispute reached the Supreme Court, in a robust assertion of national power, Story found Pennsylvania’s law preempted by the 1793 Act.²⁷² Further, he extolled property rights, he held as sacred above all other rights, and referred to the “possession” or “repossession” of a person such as Margaret Morgan as property twenty-two times in his discussion of the interests at stake.²⁷³ As Holden-Smith argued, Story, who never mentioned the problem of kidnapping, “subordinated the claims of black people to human dignity to the claims of slaveholders to their property.”²⁷⁴

²⁶⁷ Holden-Smith, *supra* note 202, at 1087. See also Morris, *supra* note 265, at 33-34; Joseph Noyes, *The Prigg Case and Fugitive Slavery, 1842-1850*, 39 J. NEGRO HIST. 185, 197-99 (1954).

²⁶⁸ Some prohibited the use of state jails, and state officials from assisting in the capture of alleged fugitives, or mandated jury trials or an appellate procedure. Morris, *supra* note 265.

²⁶⁹ Noyes, *supra* note 267, at 191.

²⁷⁰ Schmitt, *supra* note 258, at 24.

²⁷¹ Noyes, *supra* note 267, at 185; see also Holden-Smith, *supra* note 202, at 1122-23.

²⁷² See Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story’s Judicial Nationalism*, 1994 SUP. CT. REV. 247 (1994); see also Holden-Smith, *supra* note 202, at 1134-38.

²⁷³ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

²⁷⁴ Holden-Smith, *supra* note 202, at 1146; see generally *id.* at 1138-46. Joe Lockard describes this balancing act as Story’s “fusing of sacrificial nationalism with a racial denial of citizenship and self-determining subjectivity.” Joe Lockard, *Justice Story’s “Prigg” Decision and the Defeat of Freedom*, 52 AM. STUD. 467, 469 (2007).

The Court's decision in *Prigg*, however, also structurally changed the law of capture: by giving the federal government exclusive jurisdiction over the fugitive slave problem, Gautham Rao observes, it absolved the states of any enforcement burdens and "forced slaveholders to drastically reframe their approach to the problem of fugitive slaves."²⁷⁵ As the Justices acknowledged, the federal government had no capacity to marshal the force required for this scale of "property protection" or dispossession; the remoteness of the federal government and its lack of manpower, Roger Taney decried, would render the 1793 law "ineffectual and delusive" without help from the states.²⁷⁶ The solution the Fugitive Slave Act of 1850 eventually devised to resolve this problem also looked to the tradition of private informal militias and the tradition of the *posse comitatus*²⁷⁷: it enstated a *federal* posse comitatus law in its command to "all good citizens... to aid and assist in the prompt and efficient execution of this law." Section 9 focuses on the force required to dispossess the fugitive, acknowledging "reason to apprehend that such fugitive will be rescued by force from his or their *possession*"; it not only authorized but required the officer overseeing the capture to "employ so many persons as he may deem necessary... to overcome such force," to be paid from the U.S. Treasury.²⁷⁸ At least one source estimates that slaveowners succeeded in about 80 per cent of their attempts to repossess persons under the new Act.²⁷⁹ Still, before and after the Act of 1850, slaveholders built their own private enforcement power through local protective associations that organized "pursuing committees," recapture and reward funds, and "a force of agents" to find fugitives who crossed state lines and supplement local police forces. These types of unions for claims also resulted in great violence, pitting neighbors against neighbors, and prompting raids and shootouts, as well as kidnappings, especially in the borderlands, which R.J.M. Blackett has called "zones of maximum conflict."²⁸⁰

The extensive private mobilization and organizing on the other side of this struggle is well known as the Underground Railroad, a network of sites of interracial abolitionist organizing in parts of Ohio, south-central Pennsylvania and Philadelphia, upstate New York and New York City, the area around the District of Columbia, the port cities of New Bedford and Boston, Detroit, western

²⁷⁵ Gautham Rao, *The Federal "Posse Comitatus" Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 L. & HIST. REV. 1, 22 (2008).

²⁷⁶ *Id.* at 22.

²⁷⁷ For a comprehensive account of this tradition and the 1850 Act's innovation, see generally Rao, *supra* note 275.

²⁷⁸ *Fugitive Slave Act of 1850*, LILLIAN GOLDMAN LAW LIBRARY, https://avalon.law.yale.edu/19th_century/fugitive.asp (italics mine).

²⁷⁹ Rao, *supra* note 275, at 26 (referencing Campbell, *Slave Catchers*).

²⁸⁰ R.J.M. Blackett, *Dispossessing Massa: Fugitive Slaves and the Politics of Slavery After 1850*, 10 AM. NINETEENTH C. HIST. 127-30 (2009).

Illinois, black settlements in Canada and free black communities in border slave states and the northwest.²⁸¹ Like well-known luminaries such as Harriet Tubman, Frederick Douglass, and Sojourner Truth, many who “self-emancipated” by flight joined the abolition movement to help lead it with their advocacy, writings, and by undertaking the perilous risks of “running slaves.” The number of people who escaped enslavement is difficult to know for certain, but in her recent account of the abolition movement, Manisha Sinha cites a contemporary estimate of 150,000 persons between 1830 and 1860.²⁸² For a sense of proportion, between 1790 and abolition, the population of enslaved people grew by about 580%, from about 700,000 to almost 4 million people. During this period, the abolitionist movement was organizing powerfully, nationwide and also internationally, not only for an end to enslavement but for citizenship, enfranchisement, and equality, insisting, “WE ARE AMERICANS.”²⁸³ Against this backdrop, the *Missouri Republican* alone ran ads showing an annual average of 40 people escaping their enslavers between 1851 and 1860; similar ads in Richmond newspapers during that time indicated an annual average of 70 escapes.²⁸⁴

Abolitionists, highly conscious of slaveholders’ invocation of property rights, resolved to refuse it in absolute terms, to the point of criticizing Douglass’ purchase of his own freedom with British funds. William Lloyd Garrison, insisting that enslaved people’s efforts to purchase their own and their family’s liberation could not be called compensation to slaveholders, rather called the money a “ransom.”²⁸⁵ Self-emancipated people, in the literature they produced, frequently referenced and repurposed familiar property theories. Henry Bibb, who escaped to freedom in 1841 and published his narrative in 1849, invoked the labor theory when he asked “who had a better right to eat the fruits of my own hard earnings than myself?”²⁸⁶ William Wells Brown, who escaped in 1834 and published his story in 1847, pointed to his own dispossession when he called his master “the man who stole me as soon as I was born.”²⁸⁷ James W.C. Pennington, who escaped slavery at the age of 19 in 1827, and became the first Black student at Yale and published the first history of Black

²⁸¹ Sinha, *supra* note 223, at 400.

²⁸² *Id.* at 382.

²⁸³ *Id.* at 324, 316-30, Ch. 11.

²⁸⁴ Blackett, *supra* note 280, at 119, 121.

²⁸⁵ Sinha, *supra* note 223, at 427-28, 446.

²⁸⁶ *Id.* at 430-31. See also account of Edward Clarke, who published his account in 1845. *Id.* at 382.

²⁸⁷ *Id.* at 428.

people in the United States,²⁸⁸ in his narrative of escape resoundingly denounced the “chattel principle” that reduced human beings to marketable commodities as the essence of slavery.²⁸⁹

All this evidence of self-possession was most galling to slaveholders, whose own right to possession it directly challenged. For this reason, they spun narratives in response that “refused to acknowledge among runaways signs of rationality, emotion, and independence, which they hoped to both ignore and suppress”²⁹⁰: they blamed white “negro stealers,” “unnamed white men,” and “thieving Abolitionists” for their losses,²⁹¹ widely blamed white abolitionists were leading and inspiring fugitives, rather than the reverse,²⁹² and claimed that Douglass could not possibly have been enslaved.²⁹³ An 1851 cartoon by the Philadelphia lawyer and artist Edward Williams Clay, who specialized in pro-slavery political illustrations, is typically demeaning and insists that the issue is possession of property: its first panel depicts a slaveholder and federal marshal invoking U.S. law to confront a white abolitionist, with a fugitive enslaved person cowering behind him, while the second shows the same abolitionist pointing to stolen cloth in the shop of the slaveholder, who responds with regard to the cloth: “They are fugitives from you, are they?... I have a higher law of my own, and possession is nine points in the law”²⁹⁴; the enslaved person agrees: “Of course Massa. De dam Bobolitionist is de wus enemy we poor n***s have got.”²⁹⁵ The law lent its force to this narrative in charging white abolitionists with dispossession: 1854, for example, Kentucky governor Lazarus Powell demanded the return of enslaved persons from Indiana governor Joseph Wright, and charged white abolitionist Delia Webster “with conducting and (enticing)

²⁸⁸ JAMES WILLIAM CHARLES PENNINGTON, *THE ORIGIN AND HISTORY OF THE COLORED PEOPLE* (1841).

²⁸⁹ *Sinha*, *supra* note 223, at 432.

²⁹⁰ *Wood*, *supra* note 255, at 248.

²⁹¹ *Blackett*, *supra* note 280, at 125-26.

²⁹² *Sinha*, *supra* note 223, at 382.

²⁹³ *Id* at 425.

²⁹⁴ Library of Congress, *What's good for the goose is good for the gander*, <https://www.loc.gov/pictures/item/2008661533/>.

²⁹⁵ Edwards William Clay, Print/Lithograph, *What's Sauce for the Goose Is Sauce for the Gander*, Image no. 14131, The Image of the Black in Western Art Research Project and Photo Archive, W.E.B. Du Bois Inst. for African & African American Research, Harvard University.

away slaves from the possession & services of there masters and (overseers).”²⁹⁶ Even when enslaved people “quite literally and obviously took their lives in their own hands,” as Wood writes,” they were “misrepresented as passive objects, ‘forced,’ ‘urged,’ ‘allowed,’ or ‘provoked’ to escape by various whites.”²⁹⁷ This narrative manipulation is significant not only because it has had a lasting effect on historiography and national memory, but because this erasure of the way people resisted enslavement, which originated with slaveholders, is but one step from the broader erasure of the history of their dispossession from a field like property law, as this article in the first instance aimed to address.

CONCLUSION

The centuries-long effort to produce, maintain, and develop new forms of property in lands wrested from Native nations and people abducted from Africa and their descendants indelibly shaped the development of property law in the United States. By taking up the traditional topic of acquisition of property, and examining its three main theories—discovery, labor, and possession—I have shown that these theories played major roles in the history of acquisition in America. Further, they explain many aspects of the contemporary property law system, as well as its relation to the evolution of the theories, that a wholly conceptual query into how “unowned things come to be owned” cannot. These aspects of property law include the basic elements of the land system that anchors the real estate system today, including the survey system, chains of title that all originate in Native title, the comprehensive title registry, and easy foreclosure of lands. Because these features of the land system construct the enclosure and produce its liquidity in the modern marketplace, they now constitute the prescriptive features of a land regime in the process of propagation around the world that is heralded as the path to accessing the wealth of the global speculative real estate market that rich nations enjoy.

The history of property creation from which these structural innovations stem, allegorized by Locke as the labor theory, also took place in the context of a European contest to take possession of the lands, bodies, and resources of non-Europeans, and the goals and values of this project inform the techniques that it spawned. The way the fundamentally racial logic of the overarching projects of conquest and enslavement influenced this system’s development is instructive in several respects: it helps us to understand different dimensions of how racial logic works through law, in addition to giving us a fuller picture than

²⁹⁶ INDIANA HISTORICAL BUREAU, INDIANA AND FUGITIVE SLAVE LAWS, <https://www.in.gov/history/for-educators/all-resources-for-educators/resources/underground-railroad/gwen-crenshaw/indiana-and-fugitive-slave-laws/>

²⁹⁷ Wood, *supra* note 255, at 248.

we have heretofore had of the costs and the dynamics of the system that arose here, as well as providing indications about the costs and dynamics that the model could exact in other contexts.

The histories of conquest and enslavement show, for example, that the principles of first-in-time, rewarding labor, and honoring possession were all selectively applied to the racial hierarchy of the Discovery project. While relatively recent evolutions in the law of the United States have prohibited the selective application of laws and distribution of rights according to racial hierarchy, this history enables us to see the close relation—parentage, perhaps—between selective application of law and its selective enforcement according to this hierarchy, which is not subject to the same prohibitions. Further, the underlying necessity of dispossessing non-Europeans in order to establish European possession of property in both lands and people explains the powerful historical reliance of the construction of property value on this hierarchy of possession. In a manner memorialized by Locke and other colonial theorists in both coded and direct terms, without the dispossession of Native and Black people, there was no property in the first instance unless the lands and bodies were in the possessions of whites. In an emerging society borne of this racial hierarchy, the possession, presence, or proximity of non-white racial groups would correspondingly lower the value of that property, in turns of the story that go beyond the scope of this article, to follow at a future time.

Further, the massive project of dispossession that building a state on the premise of a market dominated by these two commodity categories had significant implications for the way the state would organize and regulate the racial violence of property-making and protection. Above, I examined two examples of how the state relied on private violence to perform the labor of dispossession, without exactly sanctioning or ordering it. As a result, private persons driven by self-interest organized collectively and powerfully to create and maintain property interests with racial violence, as well as to oppose that process. The struggle between these private positions was a matter of life and death, future possibility and community survival, but expressed itself frequently in law as a matter of privileging property rights above the dignity of human life and the conditions necessary to sustain it. This ongoing conflict, which was social, intimate, and affective, as well legal, economic, and political, invested whites personally in the racial hierarchy that guided property production and non-whites in the defense of themselves and their homelands against it. As it produced new norms for a society permeated by racial conflict and the violence of dispossession, it also gave literal shape to the landscape of jurisdiction across the nation and the sovereignty and power of the United States.

Finally, the norms established by this long history of violence were also epistemic. The profound investments that accrued over its course in communities and individuals have expressed themselves, in ways that we are just beginning to map, in wholly different understandings of history and very specific approaches to teaching law, interpreting its basic principles, conceptualizing its

fields, that remain couched in broader habits of understanding the world. This article began by tracing the history of erasure in the field of property law in order to open an inquiry into what we believe we know about a subject and why we think we know it. The history of knowledge production, like the history of law-making, nation-building, and property production in the United States, is characterized by much path dependence, as well as many instances at which people made decisive choices and countenanced great risk. This article offers one account of institutions, dynamics, and patterns we might better understand from a more complete account of where they came from, their historical effects, costs, functions, and failures. At a time when the instability and violence that has grown out of the histories explored here are rising, accounts of law and legal institutions that have erased these histories cannot hope to help account for them or address the consequences they have wrought.